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FEDERAL ADVISORY COMMITTEE ACT AND THE PRESIDENT'S AIDS COMMISSION

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BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

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FIRST SESSION

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CONTENTS

Page

Opening statements:

- Senator Glenn 1
- Senator Roth 11
- Senator Levin 12

WITNESSES

THURSDAY, DECEMBER 3, 1988

Michael H. Cardozo, former executive director, Association of American Law Schools; and Paul G. Dembling, senior partner, Schnader, Harrison, Segal & Lewis 4

Rosslyn S. Kleeman, Senior Associate Director, General Accounting Office, accompanied by Lynn Gibson, Office of General Counsel, and Greg Ziombra, Evaluator 17

Eric R. Glitzenstein, Public Citizen Litigation Group; Robert F. Murray, Jr., M.D., professor of pediatrics, medicine, and oncology, Howard University College of Medicine, and William B. Rubenstein, American Civil Liberties Union 25

Adm. James D. Watkins, U.S. Navy (ret.), Chairman, Presidential Commission on the Human Immuniodeficiency Virus Epidemic, accompanied by Polly Gault, Executive Director 43

Paul T. Weiss, Associate Administrator for Administration, General Services Administration, accompanied by James L. Dean, Director, Committee Management Secretariat 54

ALPHABETICAL LIST OF WITNESSES

Cardozo, Michael H.:
- Testimony 4
- Prepared statement 65
- Responses to written questions submitted by Senator Roth 72

Dean, James L.: Testimony 54

Dembling, Paul G.:
- Testimony 4
- Prepared statement 76

Gault, Polly: Testimony 43

Gibson, Lynn: Testimony 17

Glitzenstein, Eric R.:
- Testimony 25
- Prepared statement 110

Kleeman, Rosslyn S.:
- Testimony 17
- Prepared statement 82
- Responses to written questions submitted by Senator Roth 101

Murray, Robert F., M.D.:
- Testimony 25
- Prepared statement 130

Rubenstein, William B.:
- Testimony 25
- Prepared statement 137

Watkins, Adm. James D.: Testimony 43

Weiss, Paul T.:
- Testimony 54
- Prepared statement with attachments 149

Page
Weiss, Paul T.—Continued
  Responses to written questions submitted by Senator Roth 172
Ziombra, Greg: Testimony 17

APPENDIX

Prepared statements of witnesses in order of appearance 65
Federal Advisory Act (Public Law 92-463, October 6, 1972) 207
Charts prepared by the Committee 214
Rules and regulations concerning advisory committees from the Federal Register 239
Letters from:
  Department of Transportation, August 6, 1987 240
  W. Eugene Mayberry, M.D., president and chief executive officer, Mayo Foundation, November 13, 1987 241
  Woodrow A. Myers, Jr., M.D., State health commissioner, Indiana State Board of Health, November 30, 1987 244
  Adm. James D. Watkins, January 11, 1988, with a preliminary decision issued by Judge Gasch regarding the Commission's composition and other related issues under the Federal Advisory Committee Act 245
Statement of Philip J. Harter with an attachment 265

FEDERAL ADVISORY COMMITTEE ACT AND THE PRESIDENT'S AIDS COMMISSION

THURSDAY, DECEMBER 3, 1987

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn (Chairman of the Committee) presiding.

Present: Senators Glenn, Roth, and Levin.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman Glenn. The hearing will be in order.

First off, I do want to announce we will go ahead with the hearing. We have a vote on the floor and Senator Levin is going to vote now and will be here in a few minutes. I will go ahead and start the hearing and he will spell me while I go over and vote.

So I am sorry we will have a rather truncated beginning this morning, but that is one of the problems when we have votes and try and conduct hearings at the same time.

This is our first hearing on the Federal Advisory Committee Act [FACA]. FACA represents one of the four pillars of open-government laws. It fits right along with the Government in the Sunshine Act, the Freedom of Information Act, and the Administrative Procedures Act.

By passing FACA in 1972, Congress recognized the merits of allowing the Government to draw upon the knowledge and experience of public experts, and at a reasonable cost. And that is something we have encouraged.

In return, the public is supposed to be afforded an opportunity to participate actively in the Government's decisionmaking process. I think most of the time it works out exactly like that, and that is good. To achieve these simple objectives, Congress created a comprehensive legal and administrative system to regulate the establishment, the operation and termination of these advisory committees.

Over the past 15 years it is clear that this system has served the Government and the public quite well. And the real costs to the taxpayer have been held reasonably stable, as evidence by a few very telling statistics. For instance, the total number of chartered advisory committees has remained relatively constant since 1979 with approximately 1,000 committees, councils, advisory groups of one type or another in existence at any one time.

In 1986 alone over 24,000 individuals served on advisory committees, as I said, 1,000 committees in existence at any one time. It has gone considerably above that in the past and this Committee was active in the mid-1970's in believing we had formed too many committees. We had a zero option base that we pushed at that time and some 400 committees were cut out.

The total committee costs have fluctuated, rising from $25 million in 1972 to over $82 million in 1986. However, when we convert these cost figures to 1972 dollars to account for inflation, the increase is much smaller—from $25 million in 1972 to only $31 million in 1986, a very modest increase.

Though the nominal cost of each expert's advice per year has risen from $1,800 in 1974 to $3,400 in 1986, when we discount these figures for inflation, the cost per expert in real dollars has actually decreased to only $1,300 in 1986.[1]

However, the story of the Federal Advisory Committee Act is not contained in the number of committees or their costs or the numbers of people involved. We need only look as far as the President's AIDS Commission to see that there is still, even after 15 years, considerable confusion concerning the interpretation of the most fundamental provisions of the act

I am disturbed to find continued litigation over basic questions such as whether a specific group is an advisory committee as defined in the act or whether the group meets the act's balanced membership requirement. Over the years portions of the act have been criticized by several Federal Court judges called upon to interpret its provisions and Congress' legislative intent.

Indeed, one Federal judge in commenting on FACA said the following, that it was:

> Obscure, imprecise, and open to broad interpretations. If more expertise were applied to such enactments to ensure that Congress states with more precision what it intends, the rules of the game would be more sharply drawn and court involvement could be less.

That tosses the ball back in our court a little bit to make sure that we correct those difficulties that are inherent in the act itself. I realize that no law can ever cover every possible situation, and I do believe that the original architects of FACA did a fine job in creating the advisory committee system.

Senator Roth—who I understand will be here in a little while this morning—Senator Roth, who is our distinguished ranking member of this Committee, has had a very, very longstanding interest in this subject. He has been a leader in bringing some order to what was a completely chaotic situation prior to FACA. I am sure Senator Roth will want to join me in seeking to determine whether the act needs to be redrafted, even, at this time to provide clearer guidance to those charged with its interpretation and administration.

Let me say just a few words here about the use of the AIDS Commission as part of our ongoing study of FACA. The President created this advisory group as a result of strong pressure from the Senate to do so.

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[1] See p. 214 for charts and data on advisory committee cost and composition.

As a result, we have a very real desire to see that the appointed AIDS Commissioners devote their full time and attention to developing a plan for responding to the complex social and medical problems that AIDS presents. The urgency of this task was clear from the day the Commission was created 5 months ago.

What we are concerned with today is the fact that the Commission has had difficulty establishing a working environment which would allow it to complete its task. The public record suggests that this Commission for months has been distracted and confused and the Chairman of the Commission himself has been quoted as saying that the Commissioners have not done the job they were tasked to do. I know they came out with their first report, their interim report, yesterday, and we are glad to see some progress being made there.

Today we will hear testimony on how the Governmental Affairs Committee could clarify FACA to improve the functioning of important advisory groups such as the AIDS Commission.

I am pleased to learn the Commission has completed its interim report 5 days ahead of schedule. Although the report will not be the focus of our hearing today the particular policy recommendations that may emerge from the work of the AIDS Commission are things that we will look forward to hearing about at some point in the future.

So, with those words of introduction I am glad to welcome everyone here this morning. We have five different panels this morning, so it will be a long morning. We will try and move through as expeditiously as we can.

We had a choice of trying to put five panels together and have the hearing all in one morning or to try and do this in several hearings and have fewer panels per hearing. We decided that since the holidays were coming upon us and there was going to be a gap in our ability to have hearings and get people into town, or to get members together, that we would try and get as much as we could crammed into 1 day. So we will appreciate everyone's coöperation in making their points succinctly and to the point so we can move along and get to as many people as we can.

The first panel on our witness list consists of Mr. Michael H. Cardozo, former executive director, Association of American Law Schools; and Paul G. Dembling, senior partner in Schnader, Harrison, Segal & Lewis, who was a former general counsel of GAO and of NASA.

Gentlemen, we welcome you this morning and we look forward to your statements, either in a summarized version or in their entirety. In either event, the statements will be included in our record in their entirety as you presented them to the Committee.

So we welcome you this morning, and Mr. Cardozo, if you would lead off, we would appreciate your testimony.

Thank you.

TESTIMONY OF MICHAEL H. CARDOZO, FORMER EXECUTIVE DIRECTOR, ASSOCIATION OF AMERICAN LAW SCHOOLS;[1] AND PAUL G. DEMBLING, SENIOR PARTNER, SCHNADER, HARRISON, SEGAL & LEWIS[2]

Mr. CARDOZO. Thank you, Senator Glenn.

To introduce myself a little more, my involvement in the Federal Advisory Committee Act started with serving as a consultant to the Administrative Conference of the United States, and I prepared a report which has been published. Since then I have been involved in various ways with the act and the various committees to determine what should be done about it. There are a number of other reports that have been published, too, and all of them have helped to clarify the problems.

The importance of the act is exemplified by the continual establishment of new committees dealing with emerging problems and crises and by the strength of feeling on issues arising out of operations under the act. Some of these facts have been brought out by Senator Glenn's statement and I will try not to repeat them.

Right now there is litigation involving, both the operation and the status of the Presidential Commission to study AIDS and also the Committee on Judicial Selection of the American Bar Association, showing the kind of problem that arises under the act. I will discuss those a little further on.

In the recent past, the Commission on the Three Mile Island accident and two commissions on obscenity and pornography have dealt with critical subjects. And only last month the President created a task force to advise on the stock market situation.

The act was introduced and enacted because of a perception that important Government decisions were often being made on the strength of advice received from representatives of powerful special interests without the benefit of views from other persons, especially those who would be representative of the public interest. In other words, without balance.

Committees with members from major industries had been organized without public announcement and had been meeting with Government officials involved in supervising or regulating the industries represented. It was evident that in 1972 that hundreds of committees were advising almost every Government department and agency. Most of them did not have the dangerous characteristics of the industry-oriented ones described above, but there was concern that they were costing the Government more than was justified and might not be serving a function that warranted their continuance.

Senator Metcalf of this Committee at that time was the one who led the way to having hearings and eventually the act going through. Senator Roth, as has already been pointed out, was on that Committee and it is quite welcome to find that after all these years another Senator and Senate Committee are showing interest in the act.

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[1] See p. 65 for Mr. Cardozo's prepared statement.

[2] See p. 76 for Mr. Dembling's prepared statement.

The principal provisions of the act call for registration with a designated Government office of a charter stating the functions of the committee and the area of its advisory responsibility; a proper balancing of membership among various interests; meetings announced in the Federal Register; and, with specified exceptions, the meetings open to the public. Preparation and making public reports of all meetings and activities were required, including keeping all standing committees of Congress informed of those activities.

The congressional committees that introduced the act said that the committees can provide a means by which the best brains and experience available in all fields of business, society, Government and the professions can be made available to the Federal Government at little cost. In other words, the Committee was pointing out that advisory committees are good for the Government and our society. They were characterized as a contribution by the governed to the Government.

Very few members of the advisory committees receive any compensation, and therefore the cost is far less to have advisory committees of this kind than having experts put on the Government payroll or brought in as consultants.

There is a problem, however, because of the number of committees that continue in existence where they do not seem to be performing any functions, such as a few of those that have been required by acts of Congress. Nobody is entirely sure as to how those can be terminated. Senator Glenn has already told of the numbers that are involved. I will not repeat that, but it is in my statement which will be in the record.

The act has improved the system of advisory committees. The filing of charters enables the public to know when a committee has been created. Published notices of meetings assures some public access to the proceedings. The requirement of balance in the membership prevents excessive influence by single special interests. In the overwhelming number of instances, the entire system works in the public interest without undue burden on the agencies.

However, there have been some problems in the administration of the act. For example, in the peer review system where people are applying for grants, for example, from a Government agency and the committee is set up to decide who should receive the grants, those meetings almost always are closed even though they are advisory committees. And the result is that the people—the applicants—cannot find out what was said about them. People do not know why they were denied, for example, on an application. This is one of the problems.

However, on the other side, many people—members of the advisory committees—say that they would not be able to have a candid discussion of applicants if what they were saying were open to the public. However, in the case, for example, of the American Bar Association Committee on Judicial Selection, it also means that the judges who get an adverse recommendation do not necessarily know why it was that they got the adverse outcome.

One of the most troublesome questions has been the definition of an "advisory committee." A difference of opinion, for example, has existed over the problem of one-time meetings. Would a gathering of a few selected individuals at the instance of an agency head to discuss the handling of an immediate emergency confronting the agency be a committee? Could the Attorney General, without chartering and public notice, invite three or four law professors to his office to discuss the ramifications of an incident involving criminal law and the Constitution? People who come in one day, and there is no continuing membership, no structure and so forth—many people feel that that kind of a meeting is not a meeting of an advisory committee. Others, however, have argued that even that kind of a meeting should be under the act. That is an unresolved problem, but at the present time the regulations seem to exempt most of that kind of one-time meeting.

A group of individuals affiliated with some organizations such as a university, for example, that prepare a report and send it to a Government agency which then reads the report and acts on it: the question is whether that group's report is "utilized" by the Government agency, since the act says that any group "that is established or utilized by the Government agency" should be under the act. That definition has given a great many problems. But, of course, if private people form a group and send a report in, to say that they must be under the act would put an impossible burden on many organizations such as universities if they had to follow all of the requirements of the act.

Another kind of group that is considered outside the act is the so-called "operational committee," those that make decisions and do something such as, again, selecting applicants for a program such as the Fulbright program or something like that. The Bicentennial Commission on the Constitution was declared to be an "operational committee" and therefore not under the act. That also has raised some problems, because it is not quite clear why that kind of group should be outside of the act.

One problem that is quite important and should be interesting to this Committee, of course, is the question of oversight. That is, why should not there be some agency or somebody to see that the recommendations, for example, of presidential commissions are followed up and have some way to see that the recommendations of these experts are carried out.

Lloyd Cutler, when he testified on the committees when the act was being considered, said that, "the Presidential commissions burst on the scene and then pass from public view like comets, only to appear again in much the same form years or even decades later." He alluded to the successive commissions created to consider crime and law enforcement: Wickersham in 1930; Katzenbach in 1965; Milton Eisenhower in 1969; and nothing was done about them.

The commissions on pornography and obscenity are the same thing in 1970 and 1985. The President in 1970 threw it in the waste basket because he did not like the outcome, and so they had another one in 1985 which other people thought was inadequate and, again, nothing was done.

The question is, should there be some part of the Government which would each year, perhaps, report on what progress is being made to see that the recommendations are being considered and to a proper extent being carried out. It may be that congressional committees concerned with the legislation involved would be the ones to do some of that kind of oversight. Possibly it should be the Office of Management and Budget and, of course, GSA now is the agency that is charged with some kind of control and oversight of the committees.

Some people think that legislation is needed in order to resolve all of these problems and questions. Others feel that legislation is not needed, that it can all be done by regulation and by executive order. And the testimony of the people who are here this morning is to help this Committee to decide that question.

Thank you.

Senator LEVIN [presiding]. Thank you, Mr. Cardozo.

Mr. Dembling?

Mr. DEMBLING. Thank you, Mr. Chairman.

My name is Paul Dembling. I am presently a partner in the Washington law firm of Schnader, Harrison, Segal & Lewis. During my Government service I served as general counsel of several agencies and first was confronted with the Federal Advisory Committee Act and its operations.

My interest was peaked again when I served as president of the Federal Bar Association and appointed a committee to study and consider the operations of the Federal Advisory Committee Act. This balanced committee made its report and we hope that it contributed to the thinking in connection with the operations of the advisory committee system.

In order to save time, I think I will summarize my statement and hope that the entire one will be inserted in the record.

Senator LEVIN. It will be.

Mr. DEMBLING. As has been pointed out, advisory committees are an important and cost-effective part of the Federal Government. As the Chairman indicated in his opening statement, there are over 20,000 individuals serving as advisors and operating through approximately 1,000 separately organized committees. FACA is an extremely important statute. It provides the structure whereby public officials can balance the need for the Government to obtain advice, and yet obtain that advice in open fashion.

Over the years there have been some uneven spots and I listed some of them: (a) what constitutes an advisory committee; (b) the applicability of the act to subcommittees, task forces, and working groups; (c) the requirement for balanced membership in terms of committee purposes and affected interests; (d) the extent of independence and (e) the manner in which agency support services should be provided to presidential committees.

FACA now permits a great deal of flexibility in interpretation. This has resulted in differences in approaches and operations by various agencies. I believe that the requirement for a central governmental agency consultation on the decision of a Cabinet officer or agency head to create an advisory committee should be eliminated. The Congress reposes a great deal of authority and responsibility in agency heads. The agency head can be held accountable for the action within his or her agency, and consequently, I feel that there is not a need for consultation to establish an advisory committee.

If there is any central Government function, it should be to review the actions taken as a result of the committee's recommendations and to determine the general compliance with the provisions of the act regarding openness of the process, balanced membership, and freedom from undue influence, either by outside interest groups or by particular agencies or officials within the Government.

There is a comprehensive report required by the act at the present time. In some fashion this can be utilized to accomplish the oversight review purpose, in addition to the factual reportorial.

FACA should also provide for agencies to obtain a definitive interpretation of the act from a centralized, recognized source. The Department of Justice has generally occupied this position in the Government but it has not performed this function for FACA.

GAO continues to exercise its role where a question of the expenditure of funds is involved. However, there ought to be an authoritative legal interpretative office for the agencies to call on for rulings.

There is a need for greater clarity in the act's provision that an assigned agency will provide support services to a Presidential advisory committee—those with a charge to advise the President.

Specific duties to be exercised by an agency with responsibility to provide support services to a committee assigned to it has been ambiguous and it appears that the Congress may wish to speak to this matter. The question to be addressed is whether the support services should be ministerial or should have a control function in that activity.

Lastly, the FACA's ambiguities have led to different interpretations regarding what may or may not be exempted from coverage and it appears that if the Congress desires another result, it should clarify the language of the act.

Thank you, Mr. Chairman.

Senator LEVIN. Mr. Dembling, thank you.

First, Mr. Cardozo, you have alluded to a problem that has troubled me, and that is the question of followup. As a matter of fact, both of you have alluded to the question of followup of these reports from advisory groups and any recommendations that they might make.

Section 6(b) of the act says that within a year after a presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction with respect to the recommendations contained in the public report.

Do either of you know whether or not that requirement has been consistently complied with?

Mr. CARDOZO. I think it has not very well. There is a report to Congress that is prepared in the name of the President. It tells what has been happening in connection with advisory committees, but a great deal of it has been statistical, about the number of committees and so forth. It is not quite clear—maybe sometimes there has been that kind of followup, but I do not think it has been very often.

I do not know what other reports there are. Some of the people directly concerned with the Administration might be able to answer that better than I can. But there is one thing that is important to bear in mind, and that is that the Office of Management and Budget in its annual review of the needs and activities of the agencies is in a position to look to see whether this kind of thing has been carried out, whether the committees are doing their work, whether the recommendations are being followed, and whether the committee should be continued.

So to a certain extent there is an automatic checking of the committees through the OMB. Of course, when the administration of the act was shifted from the OMB to the General Services Administration, that particular kind of monitoring and supervision became much more difficult. Whether the General Services Administration is in a position to do that kind of monitoring because of the number of people involved is not quite clear.

Senator LEVIN. Mr. Dembling, do you know whether or not that provision, 6(b), is being complied with?

Mr. DEMBLING. I do not know whether it has been complied with in all instances, no, sir. I do know that the Congress on occasion has tasked various agencies. For example, after the Commission on Government Procurement rendered its report, the Congress asked the GAO to followup and to render reports to the Congress on the activities and implementation of the recommendations made by that Commission. There have been other instances of that type.

Senator LEVIN. That is an ad hoc requirement. But the law is generic; 6–B is generic and requires that the President or his delegate must make a report. It says, "shall make a report." And the law's requirement may or may not have been complied with consistently. I kind of doubt that it has been, too.

But in any event, do you believe that 6–B is a good requirement? Should we continue to require the President to tell us within a year after an advisory committee—a presidential advisory committee—has submitted a public report to the President, whether or not he is going to act on those recommendations and if not, why not? Do you both believe that is a good requirement? If not, should we drop it?

Mr. DEMBLING. I certainly think it is good. As a matter of fact, the proper administration of this act depends a great deal on the enthusiasm of the executive branch for seeing to it that it works properly. It would be very difficult for any additional provisions to make it clearer.

Mr. CARDOZO. If the executive branch has some part of it, someone in the executive branch that is concerned with this, in a way, in a sense that Senator Metcalf was concerned with it when he was around. The congressional committees, you see, concerned with the legislation affected by the work of the advisory committees can ask for this kind of thing. And one of the ways to check up, of course, is for those congressional committees to say to ask the agencies and the departments, what have you done about this.

Senator LEVIN. Well, that of course is a way of doing it, but the question is whether it should be in the statute as something that they should do on their own initiative, and I gather you both believe that this requirement is a good one.

Let me ask you whether you believe we ought to extend that to agencies where an advisory group submits its report and recommendations to an agency; should we require that the agency do what we require the President to do in Section 6(b) with presidential advisory committees?

Mr. **Dembling**. It appears that if an agency head feels that it is important for him to have an advisory committee and has actually established an advisory committee, it seems to me that he or she ought to report on what was the effect of that advice that was given to him.

Senator **Levin**. Automatically?

Mr. **Dembling**. Automatically.

Senator **Levin**. Do you agree with that, Mr. Cardozo?

Mr. **Cardozo**. Yes, except there is one thing to bear in mind and that is, the largest bulk of the advisory committees are committees to which this kind of thing really would not be very relevant. For example, the health committees in the National Institutes of Health, where they are recommending to the National Institutes of Health different provisions respecting particular diseases, drugs and so forth. There is no question about it that those committees are influential and that the NIH follows them.

The same is true on the selection committees for grantees of various agencies. There would not be any real point in having a followup of this kind for that kind of committee. But it is the presidential commissions that are the chief ones, and ones like the Presidential commissions, such as what we see now—the AIDS one and the Three Mile Island one and that kind of thing, where there is great concern as to whether there is followup or not.

Senator **Levin**. Mr. Dembling, I have got a couple of questions about how the conflict of interest statutes and regulations apply to the advisory committee members. First, should all committee members be required to submit financial disclosure forms so that the agency can know whether there might be a conflict of interest between the committee's function and a member's financial interest? And let me just give you one example.

Let's assume a consumer representative on a committee considering a toy safety regulation and that representative holds stock in a toy company. Would you think that an agency ought to know that?

Mr. **Dembling**. I think so, yes. The question, of course, is how do you go about getting that information.

Senator **Levin**. Well, the way you get it is by requiring that there be a disclosure form, a financial disclosure form filed. And do you believe we ought to require that of all committee members?

Mr. **Dembling**. Well, I think there ought to be some type of disclosure to the agency. Whether it ought to be made public is another matter, because I think that that might have a chilling effect on whether you obtain the services of people in advisory capacities.

Senator **Levin**. Well, that may get to my second question which is whether——

Mr. **Cardozo**. Senator, could I just add something to that?

Senator **Levin**. Sure.

Mr. **Cardozo**. You must remember that most people who—if it is a balanced committee—who are on these committees are put on because they have an interest, because they are experts in that particular field, which means they may be an officer of a large corporation that manufactures something. So for that kind of conflict, we really do not need anything more than knowing what the affiliation of the person is.

The particular example you just gave, you put on somebody as a representative of the consumers who has a conflict. That is another matter.

Senator LEVIN. Well, but that is a problem, because we do not require them, as I understand it, to file financial disclosure forms. But there could be an appearance, at least, of a conflict of interest.

Mr. CARDOZO. That is right. But there is another point here and that is, the Department of Defense has been asking for conflict of interest statements from all of their advisory committees and they have lost the services of some committee members because they were not in a position where they wanted to reveal their financial position.

That is the problem. You get some people who just will not serve if they have to do that.

Senator LEVIN. Which is the chilling effect issue. But is it not worth it? That is the question. I mean, we have to decide that issue. It seems to me it is a pretty fundamental issue as to whether or not we want the conflict of interest statutes and regulations to apply to these people who are serving on advisory committees.

Mr. DEMBLING. Of course, in some cases advisory committee members are considered special Government employees and they do come under the conflict of interest statute; many of them do not, however, and it can be recognized.

Senator LEVIN. Do you recommend that we apply the conflict of interest statutes to advisory committee members or not?

Mr. DEMBLING. Well, I would not—I am troubled by whether it would have, as I say, a chilling effect. If it would eliminate the availability of many experts, then I think that it would not serve a useful purpose.

Perhaps what can be done is that the agency itself, would assure itself of conflicts. There might be a self-certification of no conflict by the individuals concerned. That is a possibility. Balancing of advisory committee membership is another possibility. And then if you do apply the conflict of interest statute, there is a provision in 18 USC 208 that provides for a waiver by the head of the agency.

So if it were a case where the services were needed and it was important enough and it was not a real conflict, a waiver could be granted.

Senator LEVIN. Thank you. Senator Roth?

OPENING STATEMENT OF SENATOR ROTH

Senator ROTH. Mr. Chairman, unfortunately I have to attend a meeting of the Finance Committee on the budget deficit so I cannot participate.

I do have a statement which I would ask to be included as if read, and I do want to congratulate our Chairman for holding these hearings. I think they are timely. I think they will provide a valuable service and I would just like to go back and say that I think

Senator Metcalf who played such a key role would be pleased at the proceedings today.

Thank you, Mr. Chairman.

[Senator Roth's prepared statement follows:]

STATEMENT OF SENATOR ROTH

As one of the coauthors of the Federal Advisory Committee Act in the 92nd Congress, I said then that "there is a role for [advisory committees] to play in our government. Advisory Committees provide an opportunity for citizens to participate and become involved in our Government."

But, as one of the other authors of the Act, Rep. John Monagan, said, ". . . by not having the proper management and control we demean that role."

I think it is worth taking a moment to recall the situation that Congress faced in 1971. First, we didn't know how many advisory committees there were—or how much they cost—and we couldn't find out. There were educated guesses that ranged from 1,800 to over 3,000. No agency had the responsibility to keep track of the creation, operation, or termination of advisory committees.

Second, there were no guarantees of public access to the deliberations of these advisory committees. Some met in closed sessions. And, there was no requirement that public notice be given of advisory committee meetings that were open to the public. Accordingly, many were concerned that special interests could exercise undue influence on government decisions without scrutiny.

So, we addressed these concerns in the Federal Advisory Committee Act. First, we required OMB to commence annual reviews of all advisory committees, whether created by the Executive Branch or the Congress. With this review, we would have an accounting of all advisory committees. This responsibility was transferred to GSA by President Carter in 1977.

Second, we required that advisory committee deliberations be in public, with some exceptions tied to the Freedom of Information Act.

And, we required that advisory committees be terminated after two years unless rechartered by the parent agency. As I said at the time of Senate passage of the bill, this was intended to slow the proliferation of unneeded and overlapping advisory committees which was perceived at that time to be the most immediate problem.

So now, 15 years later, I think it is fair to say that great strides have been made in regulating Federal advisory committees. And, yet, over that period, we can see that problems remain to be addressed. Congress creates a lot of advisory committees as we did, for example, in the trade bill. And, questions of interpretation and implementation of several provisions have been raised, such as one-time meetings, membership balance, and the closing of meetings. These ought to be reviewed by the Committee.

On a couple of occasions this year, our Chairman has recalled the leadership of our late colleague, Senator Lee Metcalf, to bring some order to federal advisory committees, including rooting out and eliminating the unnecessary ones. I am sure that he, too, would be pleased that this hearing was convened.

In these times of budget austerity, every dollar counts. Where advisory committees are inactive or have fulfilled their mandate, we should be diligent in withdrawing their charters. If a redoubled effort toward this goal and the clarification of certain provisions of the Act result from this hearing, we indeed will have made a positive contribution to the Federal advisory committee system.

Senator LEVIN. Thank you, Senator Roth. Of course, your statement will be made part of the record. I also have a statement which I will indicate at this point I would like to be made part of the record.

[The statement referred to follows:]

OPENING STATEMENT OF SENATOR LEVIN

Mr. Chairman, I am pleased that you have begun hearings on the Federal Advisory Committee Act. Given the large number of advisory committees and the recent penchant we seem to have for Congressional and Presidential Commissions as the answer to some of our thorniest problems, it is important for this Committee to make sure that the requirements of the Act are being followed and that the purposes behind the establishment of advisory committees are being achieved.

While strict compliance may be somewhat uneven, on the whole, the statute appears to have worked well over the past 15 years. For the most part, as a result of FACA, the public is able to know who is advising government and what advice is being given. Moreover, I suspect that the quality of advice given to government is better than it was before the Act for the mere fact that it is subject to public scrutiny. But that doesn't mean FACA is a perfect statute. To the contrary, over the years there have been many law review articles pointing out the deficiencies in the statute, and a good number of disputes concerning the application of FACA have ended up in court.

Just this year there have been several court challenges to advisory committees on the basis that they did not comply with FACA, the most recent involving the establishment of the AIDS Commission by the President, which will be discussed today. Because the statute is so important and because there has been recent controversy about its administration and enforcement, this is good time to revisit the statute to determine if it should be amended or clarified.

One problem that is of particular concern to me is the area of conflict of interest. There is language in Section 5 of FACA that says advisory committee members shall not be unduly influenced by the appointing authority or by special interests, but there is nothing beyond that. Questions have been raised about the extent to which certain advisory committee members, particularly with the Department of Defense, may in fact be economic beneficiaries of the very decisions that the advisory committee makes. For example, frequently defense contractor representatives serve on DOD advisory committees which endorse certain activities or procurements with those very same contractors. My staff has been looking into this issues with regard to the Star Wars program, in particular. Several of our witnesses will testify to some extent about the conflicts problem this morning. However, as you and I have discussed, it is a thorny issue that deserves fuller attention, and we expect to have a full Committee hearing on that aspect of FACA early next year.

I am interested in FACA and this hearing this morning for another reason, Mr. Chairman. As you know, I have introduced a bill this session that encourages agencies to use the process of negotiated rulemaking. That is the process where an agency intending to issue a rule invites the major parties that will be affected by the rule to form an advisory committee to sit down with agency officials to develop the rule. The process has been successfully employed by EPA and several other agencies within the last several years on a number of rules. The process promises a better rule when the parties affected by the rule have a hand in its development. Likewise, they are less likely to challenge a rule which they helped create.

I mention the bill because the necessary ingredient to a negotiated rulemaking is that the negotiating committee is balanced—that is, composed of representatives of all the major identifiable interests that will be affected by the rule under consideration. What we have learned in the area of negotiated rulemaking about achieving balance may be useful in reviewing the requirements of FACA.

Thank you, again, Senator Glenn, for convening this hearing. I look forward to the testimony of today's witnesses.

Senator LEVIN. I just have a few additional questions for this panel and then we will move on to our other panel.

Mr. Cardozo, you have mentioned the controversy over one-time meetings and whether they should be covered by FACA. It seems to me that the chartering requirement may be burdensome and time consuming for a one-time meeting. Would you favor an amendment of FACA that would exempt those one-time meeting panels from the chartering requirement but still require them to comply with the notice and the open meeting requirements of FACA?

Mr. CARDOZO. I believe that what I would advocate is that the one-time meetings not be covered, but I think it can be done by the regulations. If there is no structure, if there is no continuing membership of the group, so that it really is a one-time gathering of a few advisers to the President or to a head of a department, for example, they just are not within the definition of a committee because it has no structure and no continuing role.

So I do not think an amendment is necessary unless the regulations come out and say differently. Then, I suppose if the Congress thought that was wrong, they should amend it.

Senator LEVIN. My last question of Mr. Dembling would be this. You have recommended doing away with the consultation requirement. Would you still keep the secretariat to provide guidance to agencies and to see that the agencies comply with the act?

Mr. CARDOZO. Yes, I would.

Senator LEVIN. Would you suggest that the secretariat be beefed up to exercise more clout?

Mr. CARDOZO. I think so, and I think that that might be the place where, if you were going to assign a responsibility for monitoring, that that would be the place where it could monitor.

Senator LEVIN. Thank you, gentlemen.

Chairman GLENN. Thank you. Sorry I had to be away so long. It takes a little while to get over to the floor and back and I was delayed a bit there.

The Federal Advisory Committee Act places administrative burdens on agencies which seek advice from groups of outside experts. The GSA's final rule on advisory committees contains a number of examples of advisory meetings or groups deemed not subject to the act.

Mr. Dembling, do you think that the agencies might increasingly invoke these exemptions to avoid chartering bona fide advisory committees? Is this a hindrance that we should get away from?

Mr. DEMBLING. I do not know whether they do it deliberately. I think that the topic is addressed occasionally when a committee is sought to be established and there is a feeling that there is a great deal of administrative hurdles to overcome. Various approvals are required and so forth. The thought then arises wouldn't it be easier to accomplish it in some other fashion. So I think that that is the route that may be taken on some occasions.

Chairman GLENN. Professor Cardozo, FACA requires there be an annual review of all advisory committees. Do you believe this review needs to be done every year or could there be another different cycle established? Should the review be performed by us as our oversight function? Or should GSA or somebody else do this?

Mr. CARDOZO. There are two aspects of review, of course. One is whether the committee should be continued in existence, and the other is the question as to whether its recommendations should be carried out in some way.

On the question of whether they should continue in existence, I think that the OMB's regular survey of the needs and appropriations for agencies is sufficient review to determine whether they should be continued in existence. Incidentally, if they do continue in existence but do not perform any function, they probably do not involve expenditure. So it is not a matter of great concern whether they continue in existence or not.

But on the other part as to whether the recommendations of important committees and commissions and so forth are being followed. There it seems to me that somebody should review as to whether it is being done, and Section 6–B that was cited by Senator Levin shortly ago would be the kind of review that somebody should see what is done.

But I do not think legislation will make it any better. It requires the executive branch to set up a system of doing that.

Chairman GLENN. Well, this Committee cut out quite a number of Committees in the past. One of the things I was going to put in my opening statement and then decided to leave out is that every year approximately 10 percent of all advisory committees are terminated but about the same number get created every year, too. We have a 2-year sunset for all advisory committees unless they are specifically authorized to continue for a more lengthy period of time or unless Congress has created one of them as a standing committee.

Incidentally, through some of the charts and preparation that we did for this hearing, we found that one of the biggest offenders as far as the proliferation of committees is the Congress itself. Back years ago during the Carter Administration we got into a zero-based review of all Advisory Committees which you may recall. We were effective on this Committee in cutting out some 468 committees. At that time I think there were about 1,600 or 1,700, committees altogether.

We cut out 468—60 of them by merger, 239 by just being abolished, and 169 by expiration, for a total of 468. But during that same time period, 184 committees were created. So although almost 500 committees almost were eliminated, the net decrease was 284.

Well, we cut out a lot of deadwood at that time and I thought it was an effective thing to do. We do not, however, want to carry this idea to the point where we stop getting the good information that some of these committees provide and at a very cheap cost.

Mr. CARDOZO. Senator, if I might just comment on that. It always looks good when some part of the Government is cut out so that it looks as though you are saving money. But in the advisory committee system, cutting them out does not necessarily save money, and if there is too much enthusiasm for that you can cut out some committees that are doing a lot of good.

Chairman GLENN. Mr. Dembling, FACA does not contain any explicit enforcement provisions. As a result, in the pending court case over the composition of the President's AIDS Commission, the Justice Department claimed that Congress may not have intended that there be a private right of action to enforce the balanced membership requirement of FACA.

Do you think the act should be amended to clarify the intent of Congress on this issue of enforcement?

Mr. DEMBLING. Yes. I think that Congress should speak on this matter and determine once and for all whether there is such a private right of action in this instance.

Chairman GLENN. Mr. Cardozo, what do you think?

Mr. CARDOZO. Well, I am not sure that you need any legislation. As Mr. Glitzenstein, who is here, will testify, they have succeeded in bringing actions in courts, somewhat similar to the action that is expressly authorized under the Freedom of Information Act, to require an agency to stop conducting meetings unless they balance them or unless they follow the act in some way.

It seems to me that the courts have held that they have jurisdiction to order the agencies to abide by the act, so it may not be necessary to put an express provision in there to do that, and that is a good way to enforce the act.

Chairman GLENN. You recommended that Congressional Committees be more diligent in their oversight of advisory committees created by statute, and I think this can be enough to really get control over them.

Do you also think that an agency head should also be provided the authority to terminate a statutory advisory committee?

Mr. CARDOZO. Yes, in some way. There should be a means of getting rid of statutorily required committees, particularly if those committees are required to meet every year, for example—which I think some of them are—and where their work is finished, there is no reason to spend whatever money it costs to bring them together. So some kind of provision to enable the agency head or agency itself to drop a committee that has no longer any function would be a good idea.

Chairman GLENN. Mr. Dembling?

Mr. DEMBLING. Mr. Chairman, the process I would recommend would be to have the agency head notify the Congressional Committee that initially created that Committee to inform the Congress of the proposed action and then for the agency head to have that right after that time.

Chairman GLENN. I tend to think along that line, also, because sometimes some of the committees may be formed at the direction or with the cooperation of Congress or Congressional Committees to perform a certain function. They are approved and we watch what they are doing. To say that an agency head could just summarily terminate that activity without referring to anyone else, I think would be a little much.

Mr. DEMBLING. Right, especially if the Congress is going to require notification as to what actions are being taken on the recommendations of the advisory committees, so the two of them seem to me go together.

Chairman GLENN. You also called for an independent, "monitoring process in the manner of an audit across agency lines." Could you explain that in a little more detail? What kind of audit are you thinking about and who would perform it? Would it be GAO or IG or what would it be?

Mr. DEMBLING. Well, I was sort of combining all of them, because there has been criticism with regard to what has been done by the committees.

As I pointed out, there might be a overall report that included general compliance with the provision of the act: what balanced membership there was, what freedom there had been from undue influence, either by outside interest groups or by particular agencies or officials within the Government, etc. Since the FACA now requires a comprehensive report to the Congress perhaps this could serve as the vehicle for summarizing all of the Committee's activities for the Congress.

Chairman GLENN. Gentlemen, we thank you very much.

Does staff have any questions? Anyone? Fine.

Thank you very much, gentlemen. You are both students of the whole advisory committee system. We appreciate your counsel and advice. We may want to get back to you with some more questions from other members after we have had a chance to review the record.

Mr. CARDOZO. All right.

Chairman GLENN. Thank you very much.

Our next witness is Rosslyn S. Kleeman, Senior Associate Director of the General Accounting Office.

Ms. Kleeman, welcome to our hearing and we look forward to your testimony.

TESTIMONY OF ROSSLYN S. KLEEMAN, SENIOR ASSOCIATE DIRECTOR, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY LYNN GIBSON, OFFICE OF GENERAL COUNSEL, AND GREG ZIOMBRA, EVALUATION

Ms. KLEEMAN. With me is someone from our general counsel's office, Lynn Gibson, and Mr. Ziombra, who worked on this study for us.

I would like to submit my full statement for the record [1] and briefly summarize what we have said.

Chairman GLENN. It will be included in full in the record.

Ms. KLEEMAN. On September 21, 1987 you asked us to undertake a study of the operations of advisory committees within a number of departments and agencies. And then in later discussions with your staff we agreed to focus originally on compliance with the Federal Advisory Committee Act and GSA regulations at NIH and the Food and Drug Administration and the formation and initial operations of the Presidential Commission on Human Immunodeficiency Virus Epidemic, commonly known as the AIDS Commission, which I will call it this morning.

This morning I will just discuss our work on the AIDS Commission. On June 24, 1987 the President signed Executive Order 12601, which established the Commission. And the order required that the Office of the Secretary of Health and Human Services provide administrative support services, staff and funds as needed for the Commission to perform its functions. The heads of executive departments and agencies, to the extent permitted by law, are required to also cooperate by providing needed information and administrative support.

Executive Order 12603, signed by the President on July 16, 1987, amended the initial executive order to increase the number of members on the Commission from 11 to 13. And on July 23, 1987 the Secretary of HHS signed the Commission's charter.

Essentially, the charter restated the requirements of the amended executive order. The estimated annual cost for the Commission is $1,350,000. That includes $950,000 for compensation and travel expenses of members, and $400,000 for staffing at about 8 staff years.

Currently, as you know, there is litigation involving the Commission pending and therefore we agreed with the Department of Health and Human Services that because of their concern over the litigation, our interviews with Commission members and staff would be conducted with HHS lawyers present at all the interviews.

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[1] See p. 82.

We also agreed that we would not ask questions about certain subjects which the HHS attorneys believed were related to the litigation. Those subjects were personality conflicts between Commission members, points of view of individual members, the substance of the Commission's work, the selection and appointment of individual members and their qualifications, and the Commission's representation of particular groups or points of view.

We also agreed to work through the HHS Inspector General's Office. He is the GAO liaison in all of our requests for interviews and documents.

We interviewed 10 Commission members, the former vice chairman, the former senior advisor for economics and international affairs, and the former senior advisor for medical affairs, and an associate of the former chairman who assisted him at the Commission. The former chairman did decline to be interviewed. We also interviewed Public Health Service officials about the administrative support that they gave the Commission.

Let me briefly mention some provisions of the act and what we found. Under FACA, Federal agencies must meet certain requirements in establishing and operating advisory committees. The act requires that committee documents be available for public inspection and copying in one location.

According to the AIDS Commission representatives, the documents are made available upon request. However, our tests in this area were inconclusive. Our staff members, posing as members of the public, visited the Commission on two occasions and asked to see any documents that were available. Our first try to get public documents was met with the response that we should specify what we wanted and it would be sent to us. There was no listing or other evidence of documents available to the public for them to choose from.

In a second try we were told that the staff was very busy and the documents requested, such as minutes of the meeting, were being used to prepare the interim report to the President. We were given general backup documents and told to come back later or the following day for anything else we might want.

Another provision, advisory committees must notify the public through the Federal Register when and why a meeting will be closed to the public. Only one of the AIDS Commissions meetings held thus far was closed to the public. Closure of the meeting was requested and approved on the basis that the Commission would be discussing internal personnel rules and practices and matters which if disclosed would constitute an invasion of personal privacy.

However, the minutes of the closed meeting revealed that the Commission devoted very little time to discussing personnel matters. Instead, the primary topic of the Commission's discussion was the subject matter areas to be assigned to the Commissions's subgroups, which was a proper subject for a public meeting.

Another provision, detailed minutes must be drafted and their accuracy certified by the Chairman of each Committee meeting. We found that the AIDS Commission maintained minutes of its meetings. The Chairman of the Commission, however, did not certify to their accuracy. We have minutes of two meetings in final form, two of the meeting minutes are still in draft form, and two have yet to be prepared.

Advisory committees must also publish at least 15 days before a committee meeting a notice in the Federal Register which includes the name of the committee, the time, date, place, purpose for the meeting, a summary of the agenda, and a statement on whether the meeting is open or closed to the public. If it is closed, the specific reasons should also be published.

In exceptional circumstances, fewer than 15 days notice of a committee meeting may be given, but the reasons for the abbreviated notice period must be included in the published notice. We found that the AIDS Commission did publish notices of planned meetings in the Federal Register. For one meeting, which was to be a meeting with members of the Congress, the notice was published 8 days in advance with an explanation that, quote: "The Commission needed the views of members of Congress as soon as possible," unquote.

For another meeting the notice was published 14 days in advance without explanation. And the other meetings notices' were published more than 15 days in advance as required by the regulations.

The Commission is responsible for maintaining personnel records for its staff. Since there is no organization chart, I am not certain that the records we have are complete. However, of the records that we do have, which we found housed at the Department of Health and Human Services, there are individual records which are incomplete.

For example, we found that there was no documentation that some of the staff appointments have been approved. And we have asked HHS to check their records for the missing papers. Other personnel records which we have been able to get were financial disclosure records for the Commissioners.

The Commissioner's appointment documents say they are on file at the White House and we have asked the White House for these documents and we will review them when we get them.

Chairman GLENN. Were you refused those documents?

Ms. KLEEMAN. We have not been refused them; we have been negotiating with them to attempt to get them.

Chairman GLENN. What is the difficulty?

Ms. KLEEMAN. Well, it just takes a little——

Chairman GLENN. You have been refused, basically, if you do not have them.

Ms. KLEEMAN. It just takes a little while to negotiate and we still have hopes that we will be getting them. And we will review them for you when we do get them.

Chairman GLENN. I have hopes, too.

Ms. KLEEMAN. We have been conducting back and forth negotiations with them.

The Commission, as you know, has been the subject of considerable controversy since it began and a GSA official explained to us that the Commission is an atypical committee because of its political nature and the sensitivity of the subject matter it does cover.

My full statement presents a chronology as best we can determine it of all the Commission activities, but I will briefly just discuss some of the points this morning.

On July 23, 1987, the President announced the formation of the AIDS Commission and named the members he intended to appoint. Also on that date the chairman appointed an acting executive director.

The chairman and the acting executive director then began to establish the Commission's Washington office and planned future activities. From late July until early September numerous actions were undertaken to get the Commission underway. During the first few days of September, before the Commission's members were officially sworn in, some members conducted site visits in both New York City and San Francisco.

The next gathering of the Commission took place in Washington, DC, on September 8, 9, and 10, 1987. On the evening of September 8, 1987, the day before the Commission members were officially sworn in, the members attended a gathering. Several members that we interviewed described this gathering as a social event, not as a Commission meeting.

According to some of the Commission members present, several members conversing at the gathering expressed the view that the Commission was not moving fast enough and needed to develop an action plan for accomplishing its assigned functions.

At the meetings on September 9 and 10 the Commission devoted its time to obtaining information on the Government's role in combatting the AIDS epidemic and selected interest groups views on the AIDS issues. At that time the chairman distributed a questionnaire to Commission members soliciting their views on the issues before the Commission.

We have reviewed responses that were returned by six Commission members. Some responses criticized the chairman's management style. One member said that the Commission was being run like a corporation with all decisions being made at the top and having to filter down. He believed that all Commission matters of importance should have been discussed and voted on by the full Commission.

One Commission member commented that better communication between the chairman, vice chairman and members was needed and that the most significant issue facing the Commission was the selection of another executive director and a public affairs officer. At that time the executive director had resigned on September 11, so they were looking for another executive director. This member also suggested that members should become more involved in planning and agenda development to assist the chairman in fulfilling the Commission's mission.

On September 30 the Commission held a public meeting to gather information from members of Congress on the status of legislation on AIDS issues and on October 7, 1987, the week after this meeting, the chairman and vice chairman resigned.

According to an associate of the former chairman who worked with him on Commission matters, the former chairman grew frustrated with some members' persistent criticisms of the Commission's operations. Because the former chairman declined to be interviewed, we were not able to obtain a first-hand account of the events that led up to his resignation but the former vice chairman also resigned at that time as a result of the chairman's resignation and he said he felt he could no longer serve the Commission. The current chairman was appointed on October 7, 1987, and the current executive director was appointed on October 16, 1987.

We did ask the Commission members about the HHS support and most of the Commission members knew very little of any administrative details, but the current Commission chairman and the current executive director and the former vice chairman highly rated the support service provided the Commission by the Department of Health and Human Services.

I believe that covers the important points in my statement and we would be glad to respond to any questions you have.

Chairman GLENN. Thank you very much, Ms. Kleeman. I appreciate that and we will look forward to receiving your report on the investigation upon its completion. I know you have had some difficulty getting information. We understand that, and I would presume you do not feel you have all the information you need yet to give us the full story on the Commission.

Ms. KLEEMAN. No. We are still working on it. Certainly the lawsuit has been one impediment to our getting everything we needed, but we will stay in there and we will try to get the rest of the documents.

Chairman GLENN. Good. What other documents? Do you have any other documents on request or any other requests for information that have been refused, outside the White House? Or is that the main bit of information?

Ms. KLEEMAN. That is the main bit of information. This has been a rather hurry-up operation and there are some documents that we are still going to be looking for, but the primary documents missing are those from the White House.

Chairman GLENN. What types of documents are you looking for there that you have not received yet?

Ms. KLEEMAN. Well, we have asked them for the financial disclosure statements. On the personnel papers, it does say financial disclosure statements were filed at the White House. And we have asked them for the letters of resignation and other correspondence. Some I believe may be covered by executive privilege, but we have given them a list of documents that we have heard about in our interviews that we would like to get.

Chairman GLENN. You also mentioned that an HHS lawyer was present at most of your interviews. Is that normal or was that only done because the court case has been filed? I guess the next question would be, what effect did that have on your interviews?

Ms. KLEEMAN. Well, I do not think we got the same kind of information we would have had had lawyers not been present. I know if I had been the subject of those interviews, I am not sure how I would have felt with a lawyer present watching what I said.

Chairman GLENN. Did the lawyers advise them on occasion not to answer a question?

Ms. KLEEMAN. On occasion there were things that the lawyers felt were relevant to the litigation that they suggested they not answer. On the whole—we had agreed on most of the questions ahead of time with the lawyers—and on the whole we certainly tried to stay clear of anything that would affect the litigation.

I have never been involved in a case where there were lawyers present at interviews and I just know my answers would be different if I were under that situation.

Chairman **Glenn**. Did this have sort of a chilling effect?

Ms. **Kleeman**. I suspect so.

Chairman **Glenn**. The former chairman, Dr. Mayberry, declined to be interviewed, I know. He did send a letter to the Committee, though, and I would like to quote from that letter. "It would be helpful if the chairman could be more involved in selecting the members of the Commission such that a cohesive group could be formed."

Were you able to determine whether Dr. Mayberry had any say in the selection of the other members of the Commission?

Ms. **Kleeman**. I was told that he had some suggestions to offer. I do not know if they were ever reviewed by anyone at the White House. But certainly it is the White House prerogative, the President's prerogative, to name any members of a presidential commission and we just never were able to find out if any of Dr. Mayberry's suggestions were accepted.

Chairman **Glenn**. That is the President's prerogative. I do not disagree with that. I would think that where a person is asked to be a chairman of something like this, though, that his views would be solicited or sought. I would certainly encourage that, whether it is a presidential commission or whether it is an agency commission being asked for, or a congressional commission.

It would just seem to me to be common sense that you would want that person's advice on putting the group together to perform a very specific task which this group was asked to do.

Ms. **Kleeman**. Right.

Chairman **Glenn**. It seems to me that that is rather key to the whole thing.

How many AIDS Commissioners had ever served on an advisory panel or presidential commission of any kind before? Did you get a record of that?

Ms. **Kleeman**. We did ask that in interviews. Mr. Ziombra conducted the interviews. Maybe he can talk about it.

Chairman **Glenn**. Fine.

Mr. **Ziombra**. Mr. Chairman, three of the commissioners we interviewed told us that they had previously served on advisory committees.

Chairman **Glenn**. I think it is helpful if you have somebody with some experience, but you are putting together a commission for a very specific purpose, and so you may want to call people who have never been involved with anything before. AIDS is something new in our society and so I can see that you do not necessarily have half a panel of people with previous experience on panels or commissions before.

I think this Commission is a rather important one. What guidance did the AIDS Commissioners receive on their responsibilities as commissioners and when did they get it?

Ms. **Kleeman**. Well, there was a meeting before they were sworn in—I believe it was on July 23—when they met with the President and the Secretary of HHS and many of the other officials at HHS. I believe that meeting was open to the press. We were not there at that time, but we have understood that they only discussed some of the content or the subject matter and we have been told that the HHS lawyers told them not to interact, that this was not a meeting.

So I believe at that time, they did get some preliminary information about the AIDS subject matter itself.

We also found that services contracted to handle travel and other expenses did send notices to each one of the commissioners about allowed travel and other expenses. Other than that, I am not sure. Did any of the interviewers say that they got any other information?

Mr. ZIOMBRA. No. I think that pretty much covers it, according to what we were told.

Chairman GLENN. I do not know whether you got into it in this kind of depth or not, but I was interested, in reviewing some of this material in preparation for the hearing today, that Dr. Meyers, who was the vice chairman, in his letter back to us in response to our questions of him, had a suggestion that, and I quote out of the middle of his letter here: "It would have been helpful to me as a member of the Presidential Commission to have had an outline of the relevant provisions within the act"—referring to the FACA—"perhaps in the form of a handbook that would describe the role of a presidential commission, including answers to some of the common questions about how the group could subdivide the tasks involved, appointment of officers within the commission, travel reimbursement guidelines, perhaps common pitfalls to be avoided. It also would have been quite helpful to know the full range of options available to a commission in achieving its mandate; or in lieu of such a list, a description of those options that are specifically unavailable for a commission to use. Such items should include the dependence and/or independence that a commission should have with respect to the relevant Federal agencies, ability or lack thereof to subcontract specific tasks, definitions of public meetings versus private," and so on.

Then he goes on to explain why he feels these things are important. I thought that was a very good suggestion perhaps because people coming on a commission like this have a lot of questions. They want to perform a job. They are coming in because they feel it is their duty to their country and yet they are sort of lost on how you go through this maze of laws and regulations here in Washington.

From your look at it, do you think that is a good idea?

Ms. KLEEMAN. It sounds like an excellent suggestion. I do know that in our interviews, when we did ask questions related to administrative activities, most of the commissioners were not aware of some of the administrative provisions. It sounds like a very good idea.

Chairman GLENN. The President announced the selection of the Commission members on July 23. Now, FACA provides that an advisory committee cannot meet or take any action until its charter has been filed with GSA. The AIDS Commission's charter was not filed with GSA until July 28.

Did the Commissioners meet or take any action prior to July 28?

Ms. KLEEMAN. Maybe our general counsel can answer that.

Chairman GLENN. Good.

Ms. GIBSON. As I understand it, and I think Ms. Kleeman mentioned previously, they did have a briefing during meetings with the White House and NIH on July 23. I understand that their role was essentially that of an audience listening to speeches and lectures and some discussion of the rules that would be applicable to them, and that they were advised on several occasions by counsel that they could not conduct business, they could not take action as a committee because their charter had not yet been filed.

So the indication that we have is that they did not take committee action or conduct business before the charter was filed.

Chairman GLENN. The meeting you mentioned out in Rockville, I think, that was one that was rather interesting because I guess they were advised by the lawyers, as you say, not to, "interact." In other words, you can go out there but you are supposed to drink your drink and eat your cookie, or whatever they were doing at this reception, and not discuss anything of any substance whatsoever so it could not be considered a meeting, I guess, which seems a little ludicrous but——

Ms. KLEEMAN. Several of the members did tell me they were very impressed with the array of notables who were collected there and they felt that this was going to be a very important advisory committee.

Chairman GLENN. Why didn't HHS file the AIDS Commission charter by July 23? What was the hold up on that? That is what was holding up the start of operations, wasn't it?

Ms. KLEEMAN. We were not able to find out why. I suspect it is probably just bureaucratic activity. I am not sure. Perhaps GSA would know. The charter is filed with them.

Chairman GLENN. Well, the 13 Commission members were finally sworn in on September 9. Why was there so much of a delay from July to September?

Ms. KLEEMAN. We have no idea. There were activities during that time but we found nothing to give us any hint on that.

Chairman GLENN. Well, this whole Commission is being brought together to develop consensus recommendations on ways for the Government to respond to the AIDS crisis, and it is a crisis.

From your observation do you think they are going to be able to do that?

Ms. KLEEMAN. We did not look at the content of their work at all so I am not sure that——

Chairman GLENN. You looked at it as to whether it complied with FACA.

Ms. KLEEMAN. We were looking at the administrative provisions. I would say that given the controversial subject matter that they are dealing with and the controversies that we have heard about so far, it will be a difficult matter at best.

Chairman GLENN. Well, thank you. We want to do whatever we can to help you get the information you need and I hope the White House will take today's hearing as a sign that we do want to follow through on this.

Ms. KLEEMAN. We will follow through for you.

Chairman GLENN. The work of the Commission is very important and we are trying to follow through and make certain that FACA is complied with and that we are doing our job in facilitating their work and making sure they keep on the right track. We are not just heckling people.

We want to make sure that this stays on the right track and we can get the information. We have a system where the right people can get in. They can be brought together expeditiously, do a job and do it well. That is all we are trying to do and if the law gets in the way of that, then we want to change the law. The law should facilitate that and make sure that this thing stays on track.

That is all we are trying to do and I hope the White House will see this as a way to cooperate with us. We should not be playing any games with something as important as this AIDS Commission. We are using it as an example of FACA because it is the most recent, the most visible, and has had the most problems getting off the ground and getting started. And it is important for every one of us in this room that we get that thing underway. So that is the reason that we are using it as an example.

Ms. KLEEMAN. We know they are under a tight deadline and we have tried to be as careful about our requests as possible, but we will continue to follow-up and I believe we will have some recommendations for you on possible changes to the act.

Chairman GLENN. All right, good. We will look forward to getting those.

Thank you very much.

Ms. KLEEMAN. Thank you.

Chairman GLENN. Our next panel is Mr. Eric R. Glitzenstein of Public Citizen Litigation Group, accompanied by William B. Rubenstein of the American Civil Liberties Union, and Dr. Robert F. Murray, Jr., professor of Pediatrics, Medicine, and Oncology of Howard University College of Medicine.

We welcome you to our hearing today and would welcome either a summary version or the entire report. In either event, your entire testimony will be included in the record.

Mr. Glitzenstein, if you will lead off, we would appreciate your testimony.

TESTIMONY OF ERIC R. GLITZENSTEIN, PUBLIC CITIZEN LITIGATION GROUP;[1] ROBERT F. MURRAY, JR., M.D., PROFESSOR OF PEDIATRICS, MEDICINE, AND ONCOLOGY, HOWARD UNIVERSITY COLLEGE OF MEDICINE;[2] AND WILLIAM B. RUBENSTEIN, AMERICAN CIVIL LIBERTIES UNION[3]

Mr. GLITZENSTEIN. Thank you, Senator Glenn.

I have submitted a rather lengthy statement for the record which covers various aspects of the Advisory Committee law.

Chairman GLENN. It will be included in its entirety.

Mr. GLITZENSTEIN. Thank you. I will try to distill down for the Committee the essential points in the testimony, starting out with an observation.

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[1] See p. 110 for Mr. Glitzenstein's prepared statement.
[2] See p. 130 for Dr. Murray's prepared statement.
[3] See p. 137 for Mr. Rubenstein's prepared statement.

FACA, the Advisory Committee Act, is a statute which functions largely in obscurity a good deal of the time. Just leafing through one of the recent reports from the General Services Administration, one would note that such committees as the Advisory Council on Native Hawaiian Education, the West Carson National Forest Raising Advisory Board, the Magnetic Fusion Advisory Committee, although they may be important in a local, narrow community, they are not the kind of committees that are likely to generate widespread public scrutiny and interest.

It is essentially when advisory committees are established to deal with major public problems and controversial issues that suddenly the statute becomes of far greater concern to the public and to the Congress, and it certainly seems, as Professor Cardozo noted, that of late we have had more and more advisory committees dealing with major problems. For example, advisory committees have been established to address social security problems, the acid rain issue, the Iran/Contra affair, cutting costs in the Federal Government—otherwise known as the Grace Commission—pornography, privatization of Federal functions, the stock market challenge, the *Challenger* disaster and, of course, the central concern here today, the AIDS Commission.

The Advisory Committee Act, of course, must have procedures that can apply to committees, the committees ranging from the more mundane, technical committees to these broad, blue-ribbon commissions, and I think that is one of the sources of difficulties in legislating in this area.

But these big committees, as you just noted, Senator Glenn, can also serve as a useful framework for analyzing problems with the statute, and they can likewise help to illustrate why the statute is very important. Public money is used to allay public concerns about a major problem; the public is told, in essence—we are not acting now because we need time to study the matter and we need an expert committee to come up with recommendations. If such a committee is not open, accountable, and balanced, then not only is public money wasted, but a great disservice is done to the public and to the Congress because a crucial issue has been put on the back burner.

Unless the Advisory Committee Act functions in such a way as to safeguard against the misuse of committees and to insure that there is public accountability, then everyone will suffer—the public will suffer because important issues will not be addressed as soon as they could be, commissioners themselves will suffer because they do not have rules that are clear and precise, and, of course, ultimately the government itself will suffer because it will not get the kind of advice and recommendations that may be needed to address various issues.

Unfortunately, the predominant ways in which advisory committee problems have been analyzed and thrashed out has been through the cumbersome process of litigation. As Senator Glenn noted in his opening remarks, many important advisory committees have engendered litigation, and there is no way of guaranteeing that such litigation would never occur, even with a statute that seemed to be very clear and Congress's intent seemed to be absolutely unequivocal.

However, many of the cases that have come before the courts, including the AIDS Commission case, result from a statute that is not entirely clear on some very basic questions. I hope to very briefly address two of those questions, namely, the balanced representation provision, which is currently at issue in litigation involving the AIDS Commission, and the statute's open government provisions.

The balanced representation provision is absolutely essential to the statute. Without a cross-section of views, and without expertise on a committee reflecting various segments of the scientific or technical community that is implicated, then the whole point of the committee is defeated. Either the government will be obtaining recommendations which are not informed on the issues, or the recommendations will be skewed as to some crucial issues. In either event, the whole purpose of developing an advisory committee is undermined.

Several things can be done in order to deal with such problems. One of the things that needs to be done is to clarify that members of affected public groups can sue to enforce the balanced representation requirement. In the AIDS Commission case and, previously, in the case involving the Grace Commission, the Justice Department argued that the Advisory Committee Act does not even provide the public with the right to go into court and insure that there is balanced representation. Thus, it would be very helpful if the statute were clarified so that the public would not have to overcome those threshold problems in litigation.

A more substantive concern relates to the representation of affected groups. It seems absolutely clear that an advisory committee which is established to prepare recommendations that could have a direct and possibly adverse effect on various public groups should have representation of those groups.

In the AIDS Commission example, it is hard to see how an advisory committee can come up with recommendations dealing with, for example, the development of new drugs to address the AIDS problem, or, perhaps, relating to the testing of people for the AIDS virus, unless it has some representation of those who carry the virus or are in more advanced stages of the disease. We believe that such representation is crucial not only to fundamental fairness, but it also makes fundamental common sense that those who have suffered the most and have dealt the most with a problem will bring unique experiences to bear on how to resolve the problem.

That leads to my next point—unless you actually insure that people who have expertise in the relevant areas to be studied, it is impossible to fathom how a commission can be expected to develop appropriate recommendations. By way of comparison, it is useful to refer to the relatively recent Space Shuttle Challenger Accident Commission. There seems to be widespread agreement that the composition of that commission included the people who knew the most about the problems under study—including one of the top experts in rocket engines, a Nobel Prize winning physicist who conducted impromptu experiments to determine what had gone wrong with the Challenger, an Air Force general in charge of military space programs, et cetera. Moreover, the Commission was assigned a very specific function, i.e., to get to the bottom of the Challenger disaster, and it pursued that function quickly and, according to most accounts, effectively.

The AIDS Commission, in contrast, does not have the kind of expertise necessary to scrutinize scientific and medical issues relating to AIDS, or even to deal with some of the social policy questions that other people have taken a look at. For example, there has been severe criticism by both the National Academy of Sciences and the American Medical Association, both of whom put together panels to look into the AIDS problem. Both of these groups concluded that the AIDs commission is not equipped to analyze all of the issues, and even Chairman Watkins has made similar remarks regarding the lack of expertise on the Commission.

Accordingly we believe that it would be very valuable if Congress were to clarify, either in the statute itself or in legislative history, that appropriate expertise is an essential component of any advisory committee that is developed to address a certain problem.

The other overall area I wanted to touch on involves access to advisory committee functions. If the public cannot monitor what an advisory committee is doing, then an important aspect of the statute is undercut, and, ultimately, the credibility and viability of the committee itself is threatened.

The remarks made by the General Accounting Office indicate that the AIDS Commission has suffered from a failure to scrupulously comply with the various open government components of the statute. And while some of these problems and deficiencies may sound technical on the surface, a failure to provide sufficient advance notice of meetings to the public, or a failure to make documents available within a reasonable period of time, are far from technical in effect.

If members of the public cannot efficiently and quickly get access to meetings and materials, then they are going to be unable to monitor and follow up on what the commission is doing. And, as the remarks by Mr. Rubenstein make quite clear, even someone who is making day-to-day contacts with a commission is going to find it difficult if not impossible to monitor the committee's work, unless it scrupulously complies with the open government requirements of FACA.

What we believe is essential—and we think the AIDS Commission provides a compelling justification for this—is to make it clear that a Federal official is responsible for ensuring compliance with all of the open government requirements, that there is one specific official who is ultimately accountable for that.

The other major open government question involves access to drafts and working papers of committees. This is an issue that arose with the Grace Commission example, and has arisen again with the AIDS Commission. Unless there is access to drafts and working papers, it will be very difficult for the public to know what an advisory committee is working on and to perform its valuable monitoring functions.

There are other issues which have been addressed in the hearing today, and I would, of course, be happy to answer any questions that may pertain to those other areas. But we do feel that the balanced representation issue and the access questions are the two most fundamental aspects of the statute, and they need to be addressed first and foremost.

Thank you.

Chairman GLENN. Fine.

Do we have statements from the other gentlemen.

Dr. Murray?

Dr. MURRAY. Yes.

Chairman GLENN. Go ahead.

Dr. MURRAY. Mr. Chairman, Committee members, thank you for the opportunity to present my views on this topic. I have had many years of experience and service on a number of study panels, committees and advisory commissions, going back 16 years or so, and have chaired several of those panels and commissions.

I recently served on the Task Force on AIDS, on the panel of research of the Institute of Medicine, the National Academy of Sciences, and, having served on these committees dealing with a variety of medical and scientific topics, I have learned to appreciate the complexity of the process of selecting committee members who will be able to meet the objectives and the goals for which the committee has been created. My remarks, therefore, will be directed toward that process and the problems that come up.

In the best of all possible worlds, a study committee or panel will be created of intelligent individuals who have a detailed knowledge of all aspects of the topic being studied and who also are totally neutral in their point of view and have no particular bias in the decisions that are reached or recommendations that are made.

A well-known French geneticist, Jerome Lejurn, described the ideal decisionmaking panel as "a group of individuals who had no ethnicity, no political beliefs, no religious persuasions, and were of neutral sex."

Chairman GLENN. And probably no good results from the committee. [Laughter.]

Dr. MURRAY. But since such individuals do not exist, study panels have to be chosen so that their opinions and positions are reasonably representative of the ideas and opinions that might be considered in the process of arriving at conclusions or recommendations.

It is self-evident, at least it seems to me, that the goals, objectives and scope of committee activities be clearly spelled out before it is created.

Now, the concept that has been adopted in these study bodies or deliberative bodies in that they be "balanced" relative to points of view of committee members. Unfortunately, this approach can be disastrous if the balance is achieved by including people with totally opposite points of view on the study group. This establishes a climate in which it is impossible to achieve a consensus on any points of view being considered or recommendations that are to be made to the constituting body.

The balance on the committee may best be created by first seeing to it that people from the diverse groups likely to be affected by the committee's recommendations are representated. In this way, at least, they will be sensitive to the reactions of members of these groups to the decisions that might be reached.

Important, of course, is that committee members must be able to work with and interact with one another and be open—and I underline "open"—to information and ideas that are provided by other experts in the field. This means that a committee that is to work most effectively ought not have as members people who hold opinions at the extremes of the spectrum of opinions and attitudes that are to be considered.

Committee members should hear the opinions of persons with extreme points of view but should not themselves have fixed ideas.

As an example of the matter in which this kind of system can successfully operate, I refer to the deliberations of the Advisory Committee on Bioethics to the then Secretary of HEW when it was considering the question of ethical acceptability of reproductive technology called in vitro fertilization.

It was, of course, important to consider the viewpoints of those religious groups who might object to the use of that technology. A distinguished Jesuit scholar had been appointed to the committee and, although he tended to be opposed to the artificial use of reproductive technology, his position was changed by some of the scientific information presented by consultants to the committee. He ended up being instrumental in helping the committee arrive at a consensus on the recommendations made to the Secretary for limits of research and the application of in vitro fertilization technology.

Now, the disease AIDS has created a national climate in which there is considerable controversy and this is, of course, because there are specific significant differences in the opinions among experts concerning the ways the disease is transmitted and the best courses of action to take. Other questions about AIDS were considered by the IOM after its study of the problem and, as a result, it felt that a National Commission on AIDS, with an appropriate composition of members from representative fields, would be able to maintain a continuing dialogue with experts and evaluate the progress and recommend courses of action that the appropriate Federal agencies might take at critical times.

These decisions, of course, have to be made in the face of competing ideas and theories. In this context, a Presidential panel on AIDS is a good idea and can serve as a focus of attention for public educational effort that is needed to calm the hysteria that has arisen in part because of the amount of conflicting information that has been disseminated.

A properly constituted, credible panel could have the effect of bringing a more sensible approach to the development of policies concerning AIDS testing.

The state of public opinion surrounding the AIDS epidemic is similar to the state of medical and public opinion that existed when genetic screening was first instituted for sickle cell anemia in the early 1970s. There was general hysteria and misinformation about this disease across the country and especially in the black community.

There was no central recognized source of accurate information at first, and so many legislatures passed laws mandating screening prior to entering school and even before marriage. These laws were ill-conceived and were later rescinded, but only after they had created even more confusion and ill-feeling in the black community. A National Commission on Sickle Cell Disease, with the appropriate balance of opinion and expertise among its members, might very well have been an effective way to avert much of the confusion that surrounded this disease for years afterward.

A credible, balanced national or presidential commission on AIDS can help avoid this particular kind of problem. Now, earlier, it was clear that the presidential AIDS Commission was deficient in representatives of some of those minority groups at greatest risk. This deficiency has been partly corrected by recent appointments, but other risk groups are still not represented.

Still, the problem of commission members who hold extreme or unsubstantiated positions about the transmission of the disease and implementation of programs of testing still exist, and the creation of a technical advisory group would help care providers has helped address some of the concerns about a deficiency of expertise on the commission relative to health professionals with first-hand experience with the disease. Of course, it is impossible to have representatives of every conceivable ethnic and professional group, since the panel would be too big and unwieldy, but they can be given the opportunity to have input.

Once the categories of persons needed, including representative ethnic groups, have been identified, a critical task is to generate a list of individuals who might be considered suitable members of the panel. The first step in this process is to appoint a chairman knowledgeable about the topic. At the same time, a list of names of potential panel members is generated, and in my experience one effective way to generate such a list is to poll professional societies, specialty organizations and lay groups to get the names of people who will be helpful in this regard. One may also contact experts in the field to ask them to submit the names of possible candidates.

One of the committees on which I served used this process to generate a list, so that there were at least three or four names for every position on the panel, and those persons not appointed to the panel were given an opportunity to present to the committee.

The process I described is in some way similar to the model used by the NIH in constituting its so-called Panels for Consensus Development, in which decisions are made about the application of new medical knowledge to the diagnosis or treatment of disease.

In summary, then, a successful, deliberative committee or panel will have a membership of intelligent, somewhat open-minded, receptive people that is representative of appropriate ethnic and specialty groups who are able to work together in a cooperative fashion to study and evaluate complex issues and arrive at a consensus on the key decisions and recommendations to be made to the appointing authority. At the very least, it should be a source of accurate and reliable information.

Thank you.

Chairman GLENN. Thank you, Dr. Murray.

Mr. Rubenstein?

Mr. RUBENSTEIN. Mr. Chairman, thank you very much for asking me to appear before you this morning. I have prepared a statement which I would ask be put into the record.

Chairman GLENN. It will be printed in its entirety.

Mr. **Rubenstein**. Just generally, I would summarize my remarks by saying that I have been following the work of the AIDS Commission specifically since the Commission's inception last summer. I have been following it on behalf of the organization I work for, the American Civil Liberties Union.

I have been attending all of the Commission's meetings and I have been reading the documents the Commission has been receiving. I have been using the Federal Advisory Committee Act as much as I could in the procedural aspects of those tasks. I am also involved in the litigation that is pending in the court here against the President about the composition of the Commission.

I would say that my experience in following the AIDS Commission is very similar to what the GAO found and what they reported on here. Unfortunately, what they reported on and what I have found in following the Commission is that, although the Federal Advisory Committee Act exists to help people like myself and the public in following a commission, it is not always followed exactly and very often difficulties arise with following a commission such as this one.

The difficulties I have had are the same ones that the GAO reported on. Specifically, I have had difficulty in terms of getting public access to documents from the Commission. As the GAO reported, there does not seem to be a reading room or a library, as the Act requires, so there is no central place where the public can go and inspect the documents of the Commission.

I went to the Commission offices when they were still out in Rockville in August, and I went to the Commission offices again in September to try to gain access to documents, as the Act allows me to do. On both occasions, I found that such access was just impossible and, as my statement makes clear, I had to resort to filing formal requests for documents, which is not the procedure that the Federal Advisory Committee Act sets up for these kinds of commissions.

Even after I filed these formal requests, my experience has not been that great. I filed a formal request in late September for certain documents and I did not receive these documents until last week sometime, late in November, over 2 months later.

I also had some of the other problems that the GAO pointed to in terms of closed meetings. The Act makes very clear which meetings of a commission like the AIDS Commission can be closed. On one occasion, the Commission has had a closed meeting for a certain purpose, but the minutes of that meeting reveal that the meeting was actually about a completely different subject. It is not clear why the meeting was closed since it was about that different subject. Indeed, the following day, at an open meeting, much of what the minutes of the closed meeting revealed had taken place at the closed meeting were then disclosed to the public at the open meeting. I cannot quite understand why this process takes place, because the Act is quite clear that all Commission meetings should presumptively be open to the public.

I think this is very important, and I would stress what Mr. Glitzenstein said in his statement, which is the following: the AIDS Commission was set up in many senses to show that this administration is doing something about the AIDS crisis and to allay public fears in that sense, and I think it is very important that the public has confidence in this Commission. If the public is going to have confidence in what this Commission is doing, though, it is important that the meetings of the Commission be public, be accessible to the public, and that the public have confidence that what they are seeing the Commission do in public is really what is going on in the Commission.

I also note that the GAO said that the minutes of the meetings that they have received have not been certified properly according to the law.

My experience of following the open meetings has also been a little bit troublesome. 15-day notice requirement for open meetings in the Act has not always been followed by the Commission. On several occasions, less than 15-day notice has been given in the Federal Register, as the GAO noted.

Additionally, one other point I would like to stress which is very troublesome as far as following the Commission, is the issue of document access with respect to draft documents. What is very troublesome about this issue to myself and to the American Civil Liberties Union is that the issue has arisen before on occasion, and we thought we had worked out the issue because the Act is quite clear on it. We thought we had worked it out and it is very frustrating to have to work out the same issue again and again every time a new advisory committee comes along.

The Federal Advisory Committee Act clearly states that drafts of commission reports, et cetera, draft documents should be made available for public inspection. What we have run up against in the past is that because commission meetings are open, often commissions will hold meetings to go over these draft documents when they are formulating their final reports.

The American Civil Liberties Union closely scrutinized the Meese Commission, the Attorney General's Commission on Pornography, and in that commission they met frequently to go over drafts of the final report to the Attorney General about the pornography issues. At those meetings in public they went over these draft documents; the attorney who was working for the ACLU on that issue attempted to gain access to drafts so that those public meetings would be meaningful to him. Otherwise he would be sitting at a public meeting while people discuss the document that none of the public or the press had access to—doing that at a public meeting is very frustrating because you have no idea what the people are talking about.

Because we were not able to obtain those drafts from the Meese Commission, the ACLU actually had to bring a lawsuit. When that lawsuit was brought the Justice Department sat down and looked at the act and said basically that we were correct—that the act says that these draft documents should be obtained before the meeting so that people who are going to the public meeting can go over the drafts and listen to what is going on and have some meaningful access to that public meeting. In that case, then, the Justice Department conceded the drafts were available, made them available to the public and we settled the lawsuit and that was it.

Now, the same exact issue has come up now in relation to the AIDS Commission. They scheduled a meeting in late November to go over their interim report. I asked them for drafts of the interim report or whatever they would be going over at that open meeting, so that meeting could be meaningful to me as a member of the public when I attended it.

Well, instead of making those documents available to me, the answer I got from the people and the lawyers who were dealing with the Commission was that I would have to wait 10 days and that my request for these draft documents would be handled like a Freedom of Information Act request. Well, that is not what the Federal Advisory Committee Act says. It says the documents shall be available for public inspection and it also says that draft documents shall be available, and again the Justice Department conceded this point in an earlier lawsuit. I am just not sure why this same issue is cropping up again and why I have to go through the whole process all over again.

I certainly hope this Commission will not be holding public meetings and going over draft documents when it is not going to be making those drafts available to the public. I think it is a very important issue if the public is to have confidence in what this Commission is doing, that the public have access to the documents the Commission is talking about as it goes along.

Thank you.

Chairman GLENN. Thank you. That is a very difficult area. It is one that bothers me when I get into it, because I know if I was on a commission and I might want to put forward some proposal that I had come up with that is really poppy-cock, off the wall, that I may want to toss out just in case somebody had not considered it, and yet I know that if it was picked up by the press I would be absolutely ridiculed on the front page of The Washington Post tomorrow morning, probably, but I think that you should have the kind of freedom to bring up things like that.

Now, whether you do that in the form of working papers or whether you do it only verbally and do not put anything in writing, then you are trying to circumvent the openness that we want to see in government, and yet you have to provide for that kind of an input, too.

So, I do not know what that balance is, and FACA takes one tack on it, it says a pretty stringent thing, you have access to everything just about or are supposed to have, and yet there should be some way that everything is not just hung out to dry and making people look ludicrous in trying to ferret out every approach that may be taken, particularly with something like this on AIDS, as important as it is.

Have you followed advisory councils and committees and presidential commissions before in other areas?

Mr. RUBENSTEIN. I have never followed a commission as closely as I followed this one. My area of concentration is on AIDS issues and——

Chairman GLENN. Well, in your other areas, though, where you have worked with commissions, is this one more closed than others?

Mr. RUBENSTEIN. As I say, in the case of the Pornography Commission, these same issues with relation to the drafts came up. I think my organization is sensitive to what you are saying. I think it is very important that people be able to consider ideas. That is what a commission is set up to do; but the Federal Advisory Committee Act makes it clear that when you pick this route, when you go with an advisory committee, what you are doing is setting up a public debate about various issues. The idea is that this Commission should meet and thrash out these ideas in public and arrive at some kind of consensus about where the Nation should go on these issues, and I think that is why the Act makes it clear that these things should be done in public.

I understand the concerns you are addressing, and I think one thing I would add to them is that if the members know the requirements of the Act and they know that what they say in public will be carefully scrutinized, perhaps it will make them think twice about what they are saying and carefully consider each and every word they are saying. I think it will make the meetings, the public meetings more meaningful in that sense and people will consider what they are saying and what they are going to be debating at those meetings, knowing that they are going to be in public.

Chairman GLENN. Dr. Murray, you have been on several committees and commissions in the past. How have you handled this issue to make sure that people really felt free to put out what might be ridiculous extremes one way or another, just to make sure that everything is considered? I think that is important. Maybe a little bit of my own background is leading me into this thinking, because I spent a good part of my life in the military.

If you do a military analysis, you are trained in every staff school you ever went to that in a military analysis of a military situation, you were supposed to consider everything from retreat to attack, everything from give-up to go-get-them. You consider everything, and then you eliminate the stuff that is out on the fringes, obviously, but you don't hesitate to put that down.

Now, once in a while, when the Pentagon does this in their staff analysis of something, one of the extremes leaks out from somebody and, boy, it is on the front page of the paper, "Pentagon Plans to Attack Western Europe," or something, one of these extremes.

I think it is important that everything be considered, even though they are extremes, so that nothing is left out. How do you do that with a commission and still have it open enough that the public knows what is going on.

Dr. MURRAY. Usually, at least in the two or three commissions that I have served on, where one might be willing to consider extremes or what might be considered the ludicrous, this is done in the form of papers or documents prepared by experts in the field, in which you ask them to consider the extremes and the consequences of extremes, then when those documents——

Chairman GLENN. Make them the fall-guy, so you do not have to present it yourself.

Dr. MURRAY. Exactly. Then the members of the commission, of course, can say anybody who is interested in the range of possibilities can look at Document X or Y and so forth, and then proceed to deal with what would be the substantive questions and those would have been considered.

Chairman GLENN. Is that necessary, though, to take a step like that to comply with the law? Have we written the law wrong. Does it need changes?

Dr. MURRAY. Well, only if one is sensitive to what may appear in the press.

Chairman GLENN. I hate to say this even in a meeting like this, but do we need to close this up a little bit more so people will——

Dr. MURRAY. No, I think——

Chairman GLENN [continuing]. Especially before this panel I hate to even say that, but do we need to close it up a little bit so people will feel more free to give their honest, heart-felt opinion in the commission meetings?

Dr. MURRAY. Well, I think that that has a lot to do with the people who are on the commissions. You cannot, as you well know, in the public eye, as you are, be thin-skinned and be in a position to be viewed by the public or the eye of the camera or the press, and in choosing members of committees that is one of the role of the chairman, is to know who the committee members are and what they are like and to choose people who will not feel personally harmed or wounded if somebody takes a crack at them.

Chairman GLENN. In this case, though, the chairman has not had any say apparently in who the commission members are.

Dr. MURRAY. Right, and that creates a real problem.

Chairman GLENN. Mr. Glitzenstein, you have been very quiet there while I said what I said. Do you have any comment?

Mr. GLITZENSTEIN. Yes, I do, sir. I agree fully with the notion that in part the problem can be dealt with by selecting people for committees who in fact are recognized as experts and have a record of making public pronouncements on an issue.

I think the second point to keep in mind, as the example you just gave would suggest, oftentimes when something really controversial is considered by an advisory committee, it gets out to the press anyway, and the example that comes to my mind is the Grace Commission. Apparently, at an early stage of its deliberations, there was a draft report floating about suggesting the total elimination of the Veterans' Administration.

Now, this had not come out through the normal Advisory Committee Act channels, but it was leaked, and members of the press learned about it. It became a rather significant news story, and resulted in a lot more embarrassment for the Grace Commission than if the Commission had simply released it in the course of a routine, open discussion.

For example, if, instead of having the draft report leaked, there was an open discussion where someone prefaced the report by saying, "Look, I know this is kind of a crazy idea, and I know that it is a controversial point, but I am just throwing it out for discussion," that would engender a lot less embarrassment and a lot less of a chilling effect than if it were to be released through covert channels. Overall, that is a much better process for dealing with those kinds of controversial, off-the-wall suggestions.

Chairman GLENN. You recommend that Congress make clear, that we change the law if necessary, I guess you would be implying, to make clear that persons who may be affected by the work of a committee may sue to enforce the balanced membership requirement. In doing that, what are the practical difficulties encountered now in suing over this provision. Is it so vague that you would have a difficult legal time, or have we drawn it too tight, or too loosely? What have we done?

Mr. GLITZENSTEIN. I think there are two related problems. The statutory standard could be much clearer and Congress' intent could be much clearer, and the second, very related concern is that all Federal judges are going to be extremely reluctant to intervene in a high-level Federal advisory committee like the AIDS Commission.

Even if you have what you think is a very clear case on the law and the facts, it is just going to be very, very difficult, if not impossible, to convince a Federal judge to enjoin the operation of a committee like the AIDS Commission or the Grace Commission or any other high-level, blue ribbon committee which is established to deal with a controversial public issue. Any time you go into court, you are immediately treading on dangerously thin ice, and the only way you will ever be able to prevail in a situation like that, and actually convince a judge that, yes, we do have a legal problem that requires an injunction or any kind of Federal judicial action, is by having a statute which is as clear as possible and which spells out Congress' intent to the maximum extent that is possible.

Chairman GLENN. You have looked at the AIDS Commission so far and are suing over the balanced membership requirement in FACA. Do you look at this commission as being used as a political panel, as a political commission, as opposed to an expertise-type group? What is your basis for suing on balanced membership? You are setting your group as the judge on what a balanced membership would be or you would not have filed suit, and that is your right under the law. I appreciate that. How do you make those same judgments that the people appointing the commissioners did not make?

Mr. GLITZENSTEIN. In essence, we have not looked at the motivation of the President in putting this commission together. We have not gone into court and said that the court should require balance because of some kind of evil motivation on the part of the administration. Our effort in the lawsuit is not to evaluate the intent behind the commission.

Rather, what we have done is look at the objective facts, and what we have tried to do is relate those facts to what we think Congress had in mind when it enacted the balanced representation provision. And, as my remarks suggest, we believe that there are two very fundamental things that Congress had in mind. One of them concerns the people who are going to be most directly affected, and the other one relates to a balance of experts, people who have sufficient backgrounds in the issues. That is what we have focused on in the lawsuit.

Chairman GLENN. I am just interested in following this through, though. Do you think that the people affected are the people with AIDS or people who may get AIDS? Should the people with AIDS be represented on the panel per se.

You know, I vote on legislation to prevent aircraft accidents, for instance. I do not have to go out and have an aircraft accident myself to be able to sit on that panel and to know what we are doing. I know it is important and I put my best work into it. How far do you go with this? Should the whole panel be AIDS patients, for instance? I am sure you would say no, they should not. Should there be AIDS patients on it? What do you think on this, or should there just be people who work in the medical field, like Dr. Murray and people who work with people who have AIDS all the time? What is the representation? I do not know where you come out there and I do not know where I come out, either.

Mr. GLITZENSTEIN. Well, I believe that there obviously has to be common sense in putting a commission like this together. No legislation in the world is going to make common sense obsolete. There will always have to be a reasonable evaluation of whether a particular composition is going to address the problems under study.

But in response to your question, we believe there has to be some representation, not majority representation, but some representation of both the communities that will be most directly affected by the recommendations of this Commission, and of those people who have in fact been exposed to the virus.

Now, we are not saying that there has to necessarily be a person with AIDS, but, as the National Academy of Sciences and the American Medical Association pointed out, there is an extraordinary array of individuals who have worked in the health care field, delivering services to people with AIDS, who have assisted in vocalizing the concerns of AIDS patients, and there is currently representation by none of those people. So I think that all we are doing is making the very fundamental, common sense argument that there has to be some representation of these people, both for fairness reasons and because they are the ones who are most familiar with the problems that AIDS patients and people delivering services to AIDS patients in fact are dealing with.

Chairman GLENN. Dr. Murray, briefly, because my time is up.

Dr. MURRAY. I think the problem is created because the specific questions to be answered are not spelled out. If one had the specific questions spelled out, goals and objectives spelled out, then you will know who has to be involved in the deliberations in order to arrive at a justifiable or fair answer to the question.

Chairman GLENN. That is a good point. I will come back to that later.

Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman.

On the question of conflicts of interest, as to whether or not the conflicts of interest rules and regulations apply to these committees, first let me ask you, Mr. Glitzenstein, should committee members be required to submit financial disclosure forms? Should all committee members be required to submit financial disclosure forms?

Mr. GLITZENSTEIN. I believe they should. I do not necessarily believe disclosure forms should be identical to the disclosure forms that are filled out by full-time Federal employees, but I think an abbreviated form, which simply requires the provision of information that is relevant to the service on the committee, would be very valuable.

Senator **Levin**. Should they be made public or kept private? In other words, should we allow the agency, for instance, to simply certify that they have reviewed the form and there is no conflict or appearance of a conflict of interest so as to avoid a chilling effect?

Mr. **Glitzenstein**. In the view of my organization, those forms should be made available to the public, particularly if you had an abbreviated form which simply specifies financial and other information that is relevant to the service on the committee. I do not believe that would involve a significant chilling effect but, on the other side of the balancing test, the public as well as the agency has a very substantial interest in evaluating whether there are conflicts of interest and whether overall the committee is balanced. Many agencies do, in a very scrupulous way, attempt to accomplish balance on advisory committees, but unfortunately and regrettably there are some that do not and the public is needed as a check to insure that advisory committees are complying with the statute.

Senator **Levin**. Dr. Murray, now let me ask you about the experience that you have had as a member of advisory committees. Have you been requested to file financial disclosure forms with agencies in connection with your appointment?

Dr. **Murray**. Yes, in all cases I have been asked to do that and the forms require only that you relate to areas in which you may be involved. We have been assured that those would be kept private, and I disagree with my colleague here that I think those should be kept private, rather than public.

Senator **Levin**. All right. You have been assured that they would be kept private but have been required to file them.

Dr. **Murray**. Yes.

Senator **Levin**. Have you been requested to file those before or after your-appointment?

Dr. **Murray**. Actually, simultaneously with your appointment, at a time when, if you wish, you can withdraw. So if there was someone who felt that there was a conflict or that there was information they would prefer not to reveal, they could withdraw.

Senator **Levin**. Would they have to withdraw or simply would they not be appointed? In other words, if you have been asked the question to file the form prior to your appointment, so that——

Dr. **Murray**. No.

Senator **Levin** [continuing]. If you say you do not want to do it, then you would not be appointed?

Dr. **Murray**. No. That is an important point. Usually, you are appointed and then, at the very first meeting, briefing on the administrative requirements of the committee, et cetera, rules and regulations, you are asked to file.

Senator **Levin**. Doctor, when you are appointed to an advisory committee, have you been informed as to whether or not you are considered a special government employee and whether you are subject to conflict of interest rules?

Dr. **Murray**. Yes.

Senator **Levin**. You have been informed.

Dr. **Murray**. Yes.

Senator **Levin**. And they said you are going to be considered a special government employee?

Dr. **Murray**. Yes. Whenever I have worked for the government, the advisory committee, the Secretary, NIH, except for Academy of Sciences, of course, not there, but any government agency, I am made an employee of the government.

Senator **Levin**. You said that you would object to these forms being made public.

Dr. **Murray**. Yes.

Senator **Levin**. I take it that you would have no objection to a requirement that the agency certify publicly that there is no conflict or appearance of a conflict.

Dr. **Murray**. Correct.

Senator **Levin**. On a different subject, Mr. Glitzenstein, you have mentioned that you think that agencies should solicit publicly applications and nominations for membership on committees. Apparently, some agencies already do that. Do you think that we ought to amend the Act to require or encourage that procedure?

Mr. **Glitzenstein**. I do. Unfortunately, that procedure is followed by some agencies with a great deal of success, but not by all agencies, and there is no assurance, without legislative clarification, that such a procedure will be adopted across the board.

Senator **Levin**. Do you know of any agencies that make the disclosure forms public, going back to that issue just for a minute?

Mr. **Glitzenstein**. Offhand, I do not. There was a study done a number of years ago by Common Cause that focused precisely on the conflict of interest question, and it did a fairly comprehensive survey of various agencies' practice with respect to maintaining and, I believe, disclosing forms, I think that would probably provide the definitive answer to that question.

Senator **Levin**. As I understand it, FACA has no sanctions for an agency violating that act. Would you suggest that we amend the law to incorporate sanctions, penalties for Federal officials who violate the act?

Mr. **Glitzenstein**. I have a two-part answer to that. First, I think the statute absolutely requires an attorneys' fees provision for members of the public who go to court and prevail. That has proven to be an extremely useful device in the FOIA context, and the Sunshine Act context, for insuring compliance with the law. Quite frankly, I think it has been a more important remedy than has the FOIA sanctions provision, which has been rarely used.

If, in fact, one could develop a sanctions procedure that would be implemented and followed, then it could be a valuable way of insuring compliance with the statute, but the experience of the Freedom of Information Act context, quite frankly, suggests to me that other ways of achieving compliance with the law may be superior to a sanctions provision.

Along those lines, I might just add that most of the time violations of the Advisory Committee Act are not purposeful evasions of the statute. Problems arise mainly because people are not entirely sure what the statute requires and because people are suddenly thrust in a position—I think a lot of this is true of the AIDS Commission—of implementing a law that they haven't worked with in the past. Thus, ways of familiarizing Federal officials and commission members with the statute may be a more effective vehicle for accomplishing compliance overall.

Senator LEVIN. On the question of chartering committees that only meet once or twice within a short period of time, would you support an amendment to the law which exempts those committees from the chartering requirement, but still require them to comply with the balance and the notice requirements?

Mr. GLITZENSTEIN. I would. I think it is clear that the public's major interest lies in those two areas and it is the substance that the public is concerned about, not the technicalities, and I think that kind of amendment would be appropriate.

Senator LEVIN. Thank you.

Chairman GLENN. Thank you, Senator Levin.

Just a couple more questions before we move on to Admiral Watkins. First, what is the status of the litigation involving the AIDS Commission now, either one of you?

Mr. RUBENSTEIN. We filed the lawsuit in the middle of October and the judge scheduled a hearing for October 30th, at which time the lawsuit was argued. At that point, there were two vacancies on the Commission, because of the resignations of the Chairman and Vice Chairman. Since the lawsuit was filed, after that argument on October 30th, those two vacancies were filled by two people we all thought, and our clients thought, were a step in the right direction: two people who are much more qualified and better experts. That went some degree to answering some of the problems that we had seen in the Commission, and thus we rebriefed some of the issues for the judge at that point and——

Chairman GLENN. Even though with that action you are still keeping the lawsuit in, is that correct? You have not withdrawn the suit?

Mr. RUBENSTEIN. That is correct. We felt that those two people went some of the distance to making the viewpoints of the Commission members more balanced. These people were more expert, had more expertise in AIDS issues, and we thought they balanced some of the more extreme views. We are still concerned that people who are going to be directly affected by the work of the Commission are still not represented on the Commission, and the lawsuit is still pending.

Again, we rebriefed the issues for the judge in the middle of November and it is under advisement at this point.

Chairman GLENN. What types of people do you think would balance it out so that you would withdraw the suit?

Mr. RUBENSTEIN. I think it is very focused at this point on the issue of the people who are going to be directly affected by the work of the Commission. What we would like to see is someone who represents people with AIDS and the people who provide health care to people with AIDS, these kind of people who are in the day-to-day——

Chairman GLENN. Speak up just a little bit. I think you are coming through——

Mr. RUBENSTEIN. The people who are in the day-to-day trenches of dealing with AIDS, the people who live with the disease every day, and the people who provide direct services to those people are not represented on the Commission at this point; and we feel that they have very important input into the Commission and that legally they are required to be there.

We also think, again, on the issue of inspiring confidence in the conclusions this Commission comes to, that the public would have much greater sense that this Commission was fair and was coming to good conclusions if these people were included in the decision making process. We are also concerned that AIDS has disproportionately impacted certain segments of our population, specifically black and Hispanic persons and gay persons, and we do not think those groups are properly represented on this Commission, either.

Chairman GLENN. With the size of the commission, can they all be represented?

Mr. RUBENSTEIN. Yes.

Chairman GLENN. Or would the Commission have to be expanded to a greater number.

Mr. RUBENSTEIN. Well, the Commission has already been expanded once. It was originally set up to be 11 persons and it has been expanded to 13, and obviously neither of those numbers is set in concrete. There have been commissions that have been much bigger than this. The National Academy of Sciences, which turned out a book on AIDS in 6 months, had many more people participating in the making of that book, and we think a small expansion of this Commission could satisfy our needs. In fact, such a larger Commission would not impede the work of it, but by getting these people on the Commission it would really make the work much easier for the people to do.

Chairman GLENN. OK. Has your group submitted any specific names of people you would suggest?

Mr. RUBENSTEIN. We have not submitted any specific names, though on several occasions, starting back at the beginning of September, when we first contacted the White House about our concerns, we indicated our desire to sit down with persons, and at this point with the lawyers on the other side, to point out people we would like to see and that we think would balance the Commission.

Chairman GLENN. Just a couple more questions, quickly. Dr. Murray, you stated, "One general rule of thumb instructing members of deliberative bodies is that individuals who have taken strongly polarized positions on the issue to be discussed should be excluded from committee membership, since the commissioner's job is to arrive at conclusions." Now, I agree with you on one hand, but, on the other hand, I do not, I guess, because I think we don't always want something set in concrete. The conclusion of a commission may well be, and the AIDS Commission conclusion may well be that there is not any answer right now, we have got to continue research. Now, that is not the conclusion we are hoping will come out of this, obviously, but it may be the only one available right now, so I do not know that I would agree that people that might have extreme views should be excluded in the interest of coming down with a firm conclusion of some kind.

The conclusion may be for some commissions that there is no conclusion to be had right now.

Dr. MURRAY. But that is only one reason for excluding those persons. The other reason is that they have a tendency—and I have had experience with this—to interfere with the deliberative process of the body and they spend lots of time arguing with each other and the chairman may have to spend an inordinate amount of time trying to control that kind of interaction, so that is another important reason why those kinds of views——

Chairman **Glenn**. This would be very difficult to put into law. It seems to me it is more a matter of common sense than anything else. In trying to pick people and run a meeting and you cannot have somebody who is a disruptive element and interferes with all of the meetings. On the other hand, you want all views considered, as I said, given the military example a little while ago, you want to consider absolutely everything, no matter how ridiculous it may seem, and obviously the consensus is going to be to weed this out and weed that out, and you come out down the center here some place, but you want everything to be considered in any given situation.

Dr. **Murray**. You want to hear those views and you can in expert testimony or presentations, and you can allow the commissioners to consider that in their final deliberations.

Chairman **Glenn**. One other thing. Dr. Mayberry suggested that—no, the other person I quoted from a minute ago, the Vice Chairman, Dr. Meyers, suggested that maybe a handbook to tell people what is expected of them and all of the details of coming on a commission like this might be a good idea. Now, you have been on these commissions. Do you find that people coming on have those questions? Do you think a handbook that tells them what to do would be helpful?

Dr. **Murray**. Yes, I think the NIH has something like that. It is not very detailed, a rough manual. And the NAS, Academy of Sciences, spends half a day briefing new members of new committees about the rules and regulations.

Chairman **Glenn**. Good. Thank you, gentlemen. We appreciate it. Thank you very much.

Our next witness is Adm. James D. Watkins, retired, U.S. Navy, Chairman of the Presidential Commission on Human Immunodeficiency Virus Epidemic. Admiral Watkins, welcome, it is good to see you again. We welcome you and welcome any statement you wish to make in either its entirety or an abridged version. In either event, the entire statement will be included in the record.

TESTIMONY OF ADM. JAMES D. WATKINS, U.S. NAVY (RET.), CHAIRMAN, PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, ACCOMPANIED BY POLLY GAULT, EXECUTIVE DIRECTOR

Admiral **Watkins**. Thank you, Mr. Chairman. I bring with me today my Executive Director, Ms. Polly Gault, a former staff member here in the Senate.

Chairman **Glenn**. Welcome.

Admiral **Watkins**. I would like to have her join me, if that is all right.

Chairman **Glenn**. Fine. Certainly.

Admiral **Watkins**. Mr. Chairman, members of the Senate Governmental Affairs Committee, I thank the members of the Committee for giving me the opportunity today to let you have my early views on the effectiveness of the Federal Advisory Committee Act as it relates to my new role as Chairman of the Presidential Commission on Human Immunodeficiency Virus Epidemic.

Since assuming the Chairmanship of the Commission in October, I have essentially worked full-time to get the Commission to a position from which we can carry out the mandate given us by the President.

When I first entered the AIDS Commission office, there were two or three staff on board, quite a bit of unanswered mail, and no working strategy that I could find. There was great speculation as to whether the Commission could meet even its first deadline for filing a preliminary report sketching out Commission activities for its duration by December 7 or 90 days after the Commissioners were officially designated.

Today, 7 weeks later, the Commission is fully staffed with 21 top quality staff members and the preliminary report was submitted to the President yesterday, 6 days ahead of schedule. The Commission has set up a rigorous schedule of hearings as well as drafting an outline of our final report. In the meantime, since October, the Commission has met twice in Washington for public hearings as well as spending 3 days in South Florida visiting those on the front lines of AIDS.

Hearings will resume next week and again the week following. As I said in my letter of transmittal to the President yesterday, we have learned much from the 200 witnesses who have come before the Commission. They have helped us identify issues we need to address in the near future, and I feel the commission is now on a solid footing to do its work and finish by June 1988. So that is where we are today.

The following are my very brief views on FACA. As you can appreciate, I am new to this Act. I only have limited experience, consisting of only the past 7 weeks. So, I would like to come back to the Committee, if you would allow me, after the commission work is complete, and then I will have a better insight into the workings of the Federal Advisory Committee Act. Here are just a few observations that I can make from my experience in the last 7 weeks.

I believe very strongly in the Government in the sunshine. I feel that almost all advisory committee or commission meetings should be conducted in public. However, we have been informed by counsel from the Department of Health and Human Services that we can only close our meetings if we are discussing personnel.

There are two other very limited instances in which this Committee might want to allow closure of meetings, and you discussed these in previous testimony. Mr. Chairman, I wish I had had your words because they were very much in synchronism with my thoughts.

First, for initial organizational purposes, we had a closed meeting to discuss personnel matters. It was very difficult for me, with no structure, no base line of reference to start from, to start assigning and hiring personnel before we knew what we were even talking about. So, it was a cart before the horse. It was difficult in our situation because I was trying to pick it up from virtually a zero reference base. But I believe in those circumstances there should be an opportunity to allow organizational discussion as long as it is coupled with sometimes sensitive personnel assignments. I do not believe even congressional committees would do otherwise.

Second, there should be some opportunity for the members to meet as a group privately to draft a final report. I cannot imagine that members of this Committee would believe that they could produce a quality committee report if they had to do so without the opportunity to debate tough issues, find resolutions as a result, realize and correct mistakes in private, and the like. And I think the airing of points of extremism is very germane to that discussion to reach a middle ground.

There are many times when my management technique says drive very far to one side to see if we can elicit a tighter discussion and begin to define the issues more clearly. And yet, were that to be taken out of context as an attempt to find resolution, I think you would be subject to ridicule. Therefore, I do believe there is time for tough internal discussions between the principals to try to come to the proper conclusions.

Again, I would like to come back to you at a future time, after June, with some more thoughtful recommendations than I am able to make today on possible amendments to the Federal Advisory Committee Act, and I would certainly be glad now to answer any questions that you or the members may have regarding my role as the Chairman of the Commission and its relation to your efforts here today.

Thank you.

Chairman GLENN. Thank you very much. We do appreciate your coming up to testify. I know that you are very busy with this. I understand you now have a full team of commissioners again, I believe.

Admiral WATKINS. Yes, sir, we do.

Chairman GLENN. So I know that you are eager to devote full time to it, and I commend you for getting the preliminary report out early. I do not know whether it was an accident that it came out the day before our hearing or not, but we are glad to have it out in whatever time frame it comes out.

I did have one question on it. I have not read through the whole thing yet, it is quite voluminous. I did read the cover letter here. You hit four main points in that. One is on the prevalence of AIDS. I guess the paragraphs could be summarized as the prevalence, No. 1, home care, No. 2, whether there are drugs available for the treatment of AIDS, No. 3 and the drug abuse problem in general, where AIDS is passed from one person to another, No. 4.

I read through that this morning and I was thinking a few moments ago here, you do not specifically address prevention. Was that accidental, because it seems to me that is a very important part of your whole function——

Admiral WATKINS. We do. The problem is——

Chairman GLENN [continuing]. Here, yet that is not in your summary sheets here, it is not mentioned at all. Do you plan not to get into that?

Admiral WATKINS. No, not at all, Mr. Chairman. We will address prevention. I do not want to confuse the forthcoming hearings, which are going to focus on the four issues that you just outlined to us from the final report or the rest of the agenda. What we are saying in these first four issues to the President is that, Mr. President, we think that these demand such urgent attention that we are not going to wait until our final report to make recommendations to you on these four issues, we are going to hold hearings starting next week December 10th, the week after, December 17 and 18th one each in January and February, and in February we are going to give you some recommendations on those four issues.

Now, in the meantime, we are moving on down the agenda which you will also see in the report, and we devote extensive time to hearings on prevention and education. As you know, education is the main weapon to prevent further spread of HIV, and this issue is going to take a lot of preparation time and will require a lot of study on our part to be fully ready for those hearings. We intend to do this work, because education and prevention will be key to the final report, without any question. It is all in the body of the report, you perhaps have not had an opportunity to read the remaining body, but it is all included in there.

Chairman GLENN. With the look that you have had at this so far, and I know that this is a preliminary look, you are just getting your feet on the ground, do you think there is any answer that your commission can come up with, with what you have looked at so far, other than just saying we have to continue research and study on this?

Admiral WATKINS. Yes, sir.

Chairman GLENN. Are you going to be able to come up with concrete steps that we can use and that the administration can use for several years to say, here are the approaches that we have got to take, here are the programs, they are going to cost x dollars, here are one, two, three, four, five steps that really will put us on top of the AIDS crisis, or is your final report going to be just that we need more money for research and we do not know where it is going to lead us?

Admiral WATKINS. No, Mr. Chairman, we are going to have some concrete recommendations. I was not able to say that 7 weeks ago. Until we really forced ourselves to put this preliminary report together, a road map for the future, and begin to focus on the issues that are really bothering the people out there in the country, until we could begin to put that into a structure, I was not sure. I am sure now that we are going to be able to make recommendations.

I do not see anyone else taking this intensive look at the AIDS epidemic and dealing with it in some kind of a cohesive structured way right now, so I think we are now moving into the van, instead of running along in the dust of what others are doing I feel very strongly about it, and I feel we can make contributions and our recommendations can be tough. We are not going to shy away from the most sensitive of the issues that we know we have to face regarding confidentiality and testing and the like.

Chairman GLENN. Some other nations are doing studies in these areas. Are you coordinating your efforts with other countries.

Admiral WATKINS. Yes, sir, we are. One of our principal working groups is set up under Dr. Bill Walsh, founder of Project Hope. He has already attended the World Health Organization meetings with Dr. Mahler and Dr. Mann in Geneva, and he is on top of that particular issue with members of the Commission serving on that working group.

Chairman GLENN. Dr. Murray is still in the room here. You heard me a little while ago questioning him on the necessity to arrive at a conclusion. I am of two minds: One, I want a conclusion, obviously, but I also want it to be the right conclusion in this case or we get ourselves into deeper trouble than we are in now with AIDS.

I know you have not been chairman for very long, yet, but do you think they are going to be able to, or do you have representation on the commission now that is going to come to the right conclusion, are you convinced of that?

Admiral WATKINS. Well, I am not sure what the right conclusion means. If it means that we have a 70-30 split or an 80-20 split, the answer is yes. I do not know that we are going to get consensus on every single contentious issue that faces us on this AIDS Commission. On the other hand, I believe we can drive to that, and I pride myself in bringing together a disparate group coming from various parts of society, to pull them together and come up with consensus to the extent we can, and I believe I can do that. I sense it with the Commission today. They support me, they are with me, they all signed up to this preliminary report. We are getting to know each other, getting to work together now, and perhaps what was difficult for them at the outset is becoming less so under the new leadership.

Chairman GLENN. You heard some dissatisfaction expressed by some of the previous witnesses this morning on the lack of availability of the draft reports in time so that they could be available for public hearings and so on. What is your plan on that? Could you run through how you handle——

Admiral WATKINS. Well, I am a bit of a novice on public draft reports. I have never been exposed to or heard of this kind of staff working before, where every draft has to be exposed. I think it imposes a tremendous burden on us, and I think what we are seeing now is an attempt even by ourselves to end around the system and find alternative techniques that do not violate the FACA, and I believe——

Chairman GLENN. To call it a working paper instead of a draft or something?

Admiral WATKINS. No, we use a different technique. You talk on the phone a great deal, you try to avoid those extremes from all sides where you are trying to drive some points home and so it is a difficult task for us. It is not insurmountable. I think nothing so far that I have seen in the Federal Advisory Committee Act has deterred us or slowed us down from getting this commission under way, so I do not feel that it has been a major bar. It is a problem in just the routine staffing, trying to get a piece of paper agreed to by everybody and allowing honest, even extreme positions, if they are going to be extreme in certain cases, to be aired. I think that is what I would like to allow at least some interaction on my part with the other members before the airing, which I think would be unfair to members.

Chairman GLENN. A lot of your first report, the interim report, is testimony, I understand. But now run through with me, if you will, the procedure you used for getting this report out. Who wrote the first draft? Was it staff? When was the draft circulated to the commissioners? Was it in circulation before the Commission's public hearing on November 24? If it was, then why was it not on the agenda of the Commission's November 24 meeting? How long did the Commission members have to comment on the draft? Did all of them comment? Did anyone suggest rewrites? Can you run through all of those things for me so we have an idea of how you are proceeding with this first effort?

Admiral WATKINS. Mr. Chairman, if you would allow me to let my executive director, to address that issue, answer those questions.

Chairman GLENN. Run through it and answer all of those things. I will repeat them if you——

Ms. GAULT. Certainly, Mr. Chairman. Because we wanted to have every member have input into the draft, and we did not want them held responsible for staff views, my personal views or whatever, we had to use the following procedures. After our public meeting on the 24th of November, where we were meeting with the Institute of Medicine and the American Medical Association and getting their views about their comprehensive reports, what we did was have groups of commissioners who could come in a day earlier or a day later or whatever, come in and sit down with the staff to go over what they felt should be in a preliminary report.

Chairman GLENN. This was before the November 24th meeting, was it?

Ms. GAULT. Maybe the night before, but there was nothing—we had not prepared any documents for the November 24 meeting. What we had done was to sit down with them, three or four of them that were able to come in the night before, and others throughout the week, and get their ideas of what issues they would like to see covered we needed to see who felt that drug development was absolutely the key thing for the commission to move on very quickly, who felt that treatment programs for IV drug abusers was the key thing, and that type of input.

Then, during the day on Tuesday and Wednesday, we tried to compile what everybody had put in and smooth it over so that it was one document. Then we distributed it through express mail to everyone to try and get their additional input in, I believe on the Saturday after our Tuesday meeting on the 24. So, this report was put together in a very, very short period of time.

Chairman GLENN. There was no draft before the 24th meeting, is that what you are saying?

Ms. GAULT. No, there was not.

Chairman GLENN. It went out after the meeting then?

Ms. GAULT. After the meeting, what we got from the first couple of commissioners on the evening before, then the next couple and so on, we tried to add together to bring everything into one.

Chairman GLENN. How do you plan to do this in the future? Do you have a different agenda set for the future of an objective for getting these things out to people a week before the meeting, and will it be available to other people?

Ms. GAULT. Well, the problem is that if you want issues to be fairly debated and you want members to be able to vote on things, you do not want a document to get out ahead of time which all members have not had a chance to see. You would not want your committee operating this way, you would not want your staff to speak for you without your approval and the same thing is true for the commission.

Also, since I think we are going to use the tool of the interim report, and because some of these issues are so important to deal with, such as how do you restructure drug development procedures so that we can get more drugs available to AIDS patients right now, we envision a series of interim reports so that we are not going to be waiting until June.

So I would think—and this is what the Chairman has indicated to us, he would like a policy statement coming from the commission that the commissioners debate in open session. They decide what they want to do based on what they have heard in the hearings, and then that policy statement would be issued to the President and to the public, really in a very short period of time.

Chairman GLENN. But the Chairman does not plan to write these up ahead of time as a suggested draft and distribute them to members so they can come in and critique them or make changes in them at the next meeting?

Admiral WATKINS. I think we are going to want to use both procedures, Mr. Chairman. I am not sure yet. We have focused so much on getting the road map for the future, where we are and where we are going, to get it into an orderly fashion so we can put together the hearings in a meaningful way, with the most urgent coming early so we can go in with interim reports that we can—we are kind of finding our way on how we are going to actually do the staffing.

I think the staff buildup for this report, along the lines that the executive director just mentioned, could well be the modus operandi from this point on, recognizing that the large body of that information must come from the hearings, the witnesses we have before us, and not from any personal ideologies. I laid that out in open session during our last meeting, in public session, to make sure everyone understands that and all the commissioners understand that.

Chairman GLENN. My time is up.

Senator Levin?

Senator LEVIN. Admiral, welcome.

Admiral WATKINS. Senator Levin.

Senator LEVIN. You have indicated an intent to appoint these subgroups or subcommittees to perform some of the functions, and I am wondering whether the meetings of those groups are going to be open.

Admiral WATKINS. Yes, sir, they are. The first sub-group, we have called it a working group, is on finance and the first element of that is on prevalence. This is under Mr. DeVoss, but its first meeting will actually be chaired, by Mr. John Creedon, chairman of Metropolitan Life Insurance Company. The numbers estimates are part of his business, and he is the best qualified as a commissioner to hold that particular set of hearings. It will be open and all commissioners will be there.

Senator LEVIN. It is kind of hard to foresee too many conflicts of interest with this particular commission, but at least as a theoretical matter it is possible and therefore I would like to ask you just a few questions about that. Were you required to submit a financial disclosure form?

Admiral WATKINS. Yes, we were, a very detailed one.

Senator LEVIN. Were you required to submit that before or after your appointment?

Admiral WATKINS. It was before we were sworn in, it was required to be there. We could not be sworn in without it.

Senator LEVIN. Was it before your appointment was announced?

Admiral WATKINS. It was after the appointment was announced. It was handed out, the form was handed out during the first session we had with the President on July 23.

Senator LEVIN. Were you told whether it would be made public or not?

Admiral WATKINS. We were told that it would be kept confidential, it would not be made public.

Senator LEVIN. Would you object to the form being made public? I am not talking about yours in particular; I am talking generically.

Admiral WATKINS. I would not object to mine, Senator Levin, there is nothing in it.

Senator LEVIN. That is sad.

Admiral WATKINS. It is sad. [Laughter.]

Senator LEVIN. That is what happens to those with military service. Would you object in general to those disclosure forms being made public?

Admiral WATKINS. Yes, sir, I would. I would not object to them being made available to, certain members of Congress on this committee, to review them. I do not think that kind of debate is necessary in public. After all, when you come in on a commission like this, you would expect people to be the very best in the fields in the very subject you are talking about, so obviously there are going to be some potential conflicts. If we had a member of a pharmaceutical company or here we have a member of a life insurance company, so we have been given a general waiver so that we can discuss broad issues.

On the other hand, we have all been admonished that when issues come up that are specifically related to anything you may be involved in, you must step aside in that decision process, and we will have to use our best judgments when that comes up.

Senator LEVIN. Has that come up yet?

Admiral WATKINS. No, sir, it has not.

Senator LEVIN. It has not been an issue. OK. On the question of balance, we know that you are in court on that issue. The statute requires that the membership be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee. What can you tell us about the balance or the lack thereof on your Commission?

Admiral WATKINS. Senator Levin, I would love to discuss this in some detail with you, but as you know, we have a suit against us, there are six plaintiffs against the commission at this particular time and it would really be inappropriate for me now to discuss that point.

Senator Levin. Could you tell us at least what has been represented in court on your behalf?

Admiral Watkins. We have been represented, Senator Levin, by counsel from the Health and Human Services Department and also from the Department of Justice, and I really have to leave it in their hands. You would have to make inquiry from them. We have been advised by counsel not to respond to questions regarding the makeup of the commission, selection, or this issue of balance.

Senator Levin. That is all I have. Thank you.

Admiral Watkins. I think it might be germane, though, Senator, because I do not want to have you left empty on this issue, that I am sensitive to the staff makeup. The staff is my business, and I believe that I have a superb staff put together. On that staff are seven medical doctors, highly skilled and highly respected in the field of AIDS clinical work. They advise me on a day-to-day basis. I am ex-military man. I have an executive director, who while she worked in the field of health and education on Capitol Hill, obviously does not have the technical skill for clinical work in AIDS related matters.

So I brought that team aboard and they are there and they have been there since November 6th, a highly qualified group. I have a young man working for me who has AIDS. He has been very valuable on my staff. He gives us the inspiration to get on on an urgent basis with our task.

I have other staff members, as you know, on the Commission who are gay——

Senator Levin. He is a staff member?

Admiral Watkins. Yes, sir, he is. He is now in the hospital with pneumocystis carne pneumonia. We don't want to lose him, and we are interviewing another person with AIDS and it is likely we will bring that particular individual aboard as well. We have a commission member who was a member of the Gay Men's Health Crisis in New York. We also have another consultant who is a gay.

We have two Hispanic staff members, one who is a lawyer and another an expert in IV drug abuse and helps in other areas. We have Commissioner Benny Prim, as you know, who is black, a highly schooled individual in the field of IV drug abuse, and he also is very prominent in the AIDS minority work in the country.

I look at my staff and I try to build into that staff all of the elements this or any commission would, so that I can find in that staff some additional technical skills. So, while there may be debate on some people's part on other things, I feel that I, as the Chairman, with my staff, can add additional expertise to help us all and make us feel comfortable, because, after all, we have been given license to bring the best in the country to bear on this issue. We have heard from 200, over 200 witnesses, many of whom are persons with AIDS, we have given special emphasis to listen to persons with AIDS and their families and we have done that and the summary of the transcripts in our report describes with whom the commission has met.

So, I believe we are getting all of that input that we need, or I would get more.

Senator Levin. Thank you.

Chairman **Glenn**. You obviously are happy with your staff, and I commend you for putting together a staff that is so closely in touch with what you are trying to do.

Admiral **Watkins**. They were all trained well here on Capitol Hill, Mr. Chairman.

Chairman **Glenn**. Well, not all of them, I am sure. [Laughter.] But are you that happy with the balance on the Commission itself?

Admiral **Watkins**. I cannot answer that, Mr. Chairman.

Chairman **Glenn**. OK.

Admiral **Watkins**. I am sorry.

Chairman **Glenn**. All right, I understand. Was a draft of this preliminary report circulated to OMB and HHS and the Justice Department and the White House before it was submitted to the President yesterday?

Admiral **Watkins**. No, sir, it was not.

Chairman **Glenn**. Not to any of those groups?

Admiral **Watkins**. No, it was not.

Chairman **Glenn**. Your testimony today here, was that submitted to anyone for approval before you came up here?

Admiral **Watkins**. No, sir, it was not.

Chairman **Glenn**. Fine. I asked those questions very directly because I am concerned that, in this highly visible emotion-charged commission, you keep your independence.

Admiral **Watkins**. And I have been told by my contacts in the White House just that, Mr. Chairman——

Chairman **Glenn**. Good.

Admiral **Watkins** [continuing]. There has been no rudder order to me. I am seen as an independent chairman, doing my job and I think I can do that without any interference I do not expect any guidance and I have been told that they are not going to give me any.

Chairman **Glenn**. Well, FACA sets forth one guideline for commissions such as yours, which is intended to insure that the advice and recommendations of the committee will not be "inappropriately influenced by the appointing authority or by any special interests, but will instead be the result of the committee's independent judgment."

I do not know whether you have had to take any additional steps to make sure that you keep that kind of independent judgment, not influenced by what people might want to slant politically or whatever. I would ask, have you taken any steps to make sure that you keep that independence?

Admiral **Watkins**. I have been in this town for the last 17 years, about 15 out of those 17 years. I have testified before members on the Hill, I think I have a reputation of doing my job when assigned a job and do it independently and be forthright. I have had no indication from anyone, from any direction that there is going to be guidance to me, nor has anybody tried to give me any steers in running this Commission.

I am running it, I am out in front, I have got the commissioners behind me, and I have nobody prodding me or pushing me or trying to steer me in any direction, and that is the way it is going to remain or I will leave the Commission.

Chairman GLENN. I am glad to hear that, and that is exactly what I think your predecessor did, because he did not have control over the setting up of the Commission. I cannot say that was the problem, I am not quoting, I can only quote out of Dr. Mayberry's letter, as I did earlier, that he felt that the one thing he was willing to answer to all the questions that we submitted to him—he did not want to respond to these things, except he did say that one thing that he felt strongly about was that the chairman should be able to make an input to the selection of the commissioners, and I think that is very fundamental. It makes us be a little suspicious as to what is going on when a chairman is called in to do a certain job and is not given that kind of courtesy, at least, and the Commission was there when you came on board. There have been a couple of people added since then. Did you have an input as to their selection after you came on board?

Admiral WATKINS. It is really not appropriate, Mr. Chairman, for me to take on the selection process from the White House. They have asked that I not discuss the White House selection procedures, even if I were to know them, and I do not know all of the processes followed.

Chairman GLENN. The White House has asked you not to testify on that or the attorneys have told you not to?

Admiral WATKINS. The White House says it is their business on how they select the people for the Commission, and so I respect that and so I do not want to start putting words in the mouths of those in the White House as to what their selection process is.

Chairman GLENN. OK. And to be absolutely fair about this, it is the President's prerogative, if he wants to, to select the people he wants. That is in the law also. But it also means that when that is done without the chairman of the Commission being party to that process, it seems to me that we are quite within our rights to look at it very, very carefully and make certain that the law is being complied with and to make certain that the people selected, and yourself in particular running the program, are going to operate in an independent manner and really try to bring to bear the very finest talents we have to get control of this thing. It is that important.

Do any of the staff have additional questions? We have staff here representing other Senators today. Does anyone have anything burning on your soul here?

[No response.]

Chairman GLENN. OK. Unless you have something else to add, I think we will move on. We may ask you to answer additional questions, and just for the public record here I do firmly now and herewith, as Chairman of the Committee, accept your offer to have you come back up again for future testimony once you have gone a little further with this. And if there is anything you see, Admiral, and I say this with every bit of sincerity, this is so important for the country, the job that you are doing, that anything you see that you need help on from us or you find your independence being impinged upon or anything at all that you need, let me know, privately, publicly, a phone call, a letter, whatever, and I can assure you that we are going to be responsive to what your needs are in doing the job that you are commissioned to do. It is that important to us.

Admiral WATKINS. Thank you, Mr. Chairman.

Chairman GLENN. We have one more panel, and that is Mr. Paul T. Weiss, Associate Administrator for Administration, General Services Administration; accompanied by Mr. James L. Dean, Director, Committee Management Secretariat, General Services Administration.

Mr. Weiss and Mr. Dean, welcome. We welcome your testimony in its entirety or in part, in either event the entire statement will be included in the record.

TESTIMONY OF PAUL T. WEISS, ASSOCIATE ADMINISTRATOR FOR ADMINISTRATION, GENERAL SERVICES ADMINISTRATION, ACCOMPANIED BY JAMES L. DEAN, DIRECTOR, COMMITTEE MANAGEMENT SECRETARIAT

Mr. WEISS. Mr. Chairman, thank you for the opportunity to testify today on actions taken by the General Services Administration to implement the Federal Advisory Committee Act within the executive branch. My comments this morning will summarize my prepared statement which has been provided to the Committee.[1]

Accompanying me today is Mr. James L. Dean, Director of our Committee Management Secretariat. The Secretariat, mandated by section 7(a) of the act, is responsible for the direction of GSA's activities to provide governmentwide oversight of all Federal advisory committees.

As we have heard here today and know from our own experience, advisory committees play an important role in assuring that Federal officials have access to information and advice on a broad range of issues affecting government policies and programs.

The Federal Advisory Committee Act is designed to fulfill two important objectives: On the one hand, it provides for a process to monitor the amount of Federal resources devoted to the use of advisory committees, and, on the other hand, provides for the maximum participation possible by the public in committee activities.

These objectives are bound together by the Act's emphasis on the provision of information to the Congress by the preparation of an annual report on Federal advisory committees, and to the public, through provisions calling for advance notice of committee meetings.

In addition, the Act provides that meetings of Federal advisory committees may be closed to public participation only through formal determinations by the heads of executive branch departments and agencies based upon exclusions provided by the Government in the Sunshine Act.

I am pleased to note that since the transfer of the Committee Management Secretariat to GSA in 1977, the costs associated with maintaining advisory committees within the executive branch have increased at an average annual rate of only 2.8 percent. This is graphically displayed in the chart presented to you at this point.[2]

At the spike you see on the left, it is interesting to note, we have about a 25 to 30 percent increase in costs for that 1978–79 time period. It is related primarily to four or five major committees established, having to do with world hunger, Three Mile Island, Social Security, coal, and a couple others of major interest to the Federal Government. They accounted for the bulk of the costs for that time period.

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[1] See p. 149.

[2] The charts referred to start on p. 167.

At the same time, as shown on our next chart, the total number of such groups have declined by 26 percent. As you noted earlier, Mr. Chairman, the number of committees has declined from a total of 1,343 in 1977, to 997 in 1986.

The next chart shows that during 7 of the past 10 years, the number of Federal advisory committees terminated has exceeded the number of those established by all types of authority. In addition, as the next chart shows, the amount of resources devoted toward compensation of Federal and non-Federal members have been reduced by 79 percent and 7.5 percent respectively during the past 4-year period.

Chairman GLENN. What is your basis for these? Did you discount these for inflation, so we had a comparison in constant dollars here——

Mr. WEISS. No, sir, actual dollars.

Chairman GLENN [continuing]. Because this chart covers periods of inflation, it gives a slightly distorted view of things.

Mr. WEISS. That is right, those lines would be a lot more scaled downward if you factored in the——

Chairman GLENN. Yes, I gave some figures in opening this morning. We have a whole series of charts, about 15 of them, I think, that had drawn up on a basis of discounted dollars so they are discounted for inflation. They give us a little better picture of things.

It comes out where we have had a rather constant picture, surprisingly enough, since we made the big reductions back in 1977–78. I think you have a break on your charts there on that also, on your first one there. Does it not go back to the seventies or wherever it was?

Mr. WEISS. Yes, 1977 was the first big spread.

Chairman GLENN. That is when the numbers came down, when we had the reductions, but then the amounts spent per person, per committee, numbers of committees, taken in constant dollars, have been fairly constant.

Mr. WEISS. That is exactly the case——

Chairman GLENN. It has been reasonably steady.

Mr. WEISS [continuing]. In today's dollars relative to 10 years ago.

Chairman GLENN. Go ahead.

Mr. WEISS. Reflecting the highly dynamic environments within which committees operate, the composition of the Federal advisory inventory has changed dramatically. For example, in 1977, the majority of the advisory committees were established by the executive branch. However, as you can see in this chart, and as the Chairman pointed out earlier today, beginning in 1979, the number of such groups established directly by congressional action increased substantially and now accounts for over 50 percent of the total inventory of our committees.

Another important change that has affected the costs of Federal advisory committees is reflected in the increased use of blue ribbon panels to address issues of complex national concern. Such committees have been established by the Congress and the Executive Branch, to provide advice and recommendations on such matters as the space shuttle *Challenger* accident, the Three Mile Island incident, efforts to combat organized crime and pornography, the basing of the MX missile, and many others.

Although representing only 2.5 percent of the total inventory in 1984, for example, the resources devoted to the activities of such committees accounted for approximately 31.3 percent of the total reported costs.

Recognizing these changes and the need to emphasize the quality of contributions rendered to the Federal community by advisory committees, GSA has undertaken a number of initiatives to strengthen the capacity of the Committee Management Secretariat to fulfill its role.

During 1987, the Secretariat completed a final rule on Federal advisory committee management and that rule was published in the Federal Register, coincidentally, on December 2. It provides for improved guidance on the implementation of FACA, streamlines the consultation process between GSA and departments and agencies sponsoring committees and clarifies the roles played by the Secretariat and committee management officers in the establishment and management of Federal advisory committees.

GSA also has taken steps to increase the resources available to the Secretariat, despite overall resource reductions which have taken place within GSA. The number of professional staff was increased last year from three to five, and the unit will soon receive an enhanced in-house computer support, consisting of state of the art hardware and software. In addition, the Administrator has approved the establishment of a new Inter-Agency Committee on Federal Advisory Committee Management to address the full range of the Secretariats statutory responsibilities.

We also look forward, in concert with this interagency committee, to drafting a handbook to provide guidance to committee management offices throughout the Government.

While we believe these initiatives will result in enhanced oversight of Federal advisory committees, we are also looking forward to working with Congress to identify other improvements which might be effected by amendments to the act.

To summarize our thoughts on these issues contained in my prepared statement, Mr. Chairman, GSA believes that any such proposal by Congress to amend the FACA should at a minimum clarify the definition of an advisory committee as it relates to the act—by the way, you have heard many of these before by earlier witnesses and by yourself—provide increased flexibility to terminate committees created by statute—at the present time, legislation is required to terminate such committees—redefine the requirement for regular review of Government-wide committee management activities to reflect cyclical rather than annual analyses; and clarify the requirement for balanced membership relative to the creation of advisory committees, review the deadline for the submission of the "Annual Report to the President on Federal Advisory Committees" to the Congress for consistency with the congressional calendar; and delete section 7(e) of the act, providing for the provision of budget recommendations relating to advisory committee activities, which we believe is a role to be properly carried out in concert between the individual agencies in the Office of Management and Budget.

Mr. Chairman, this concludes a summary of my prepared statement. I will be pleased to answer any questions you might have. Thank you.

Chairman GLENN. OK. Thank you very much.

You have testified that Congress should clarify FACA's requirement for balanced membership. GSA's final rule on advisory committees instructs agencies to consider for membership persons or groups with certain qualifications, but this rule does not "compel the selection of any particular individual or group to obtain divergent points of view."[1]

Last May, when GSA first proposed this rule, it did not contain that language and there was not any explanation before the change in the final rule. Why was that change made and why was that not explained in advance?

Mr. WEISS. Jim, I will ask you to respond to that question.

Mr. DEAN. I think the basic purpose of that is to recognize the final authority of the agency to establish an advisory committee and to compose its membership. We felt that the issue of balance, as it is addressed in the act, should be handled by the agency in terms of constructing the committee.

So, what we are saying is that, when you consider balance, you are not compelled to place someone on the committee solely because he/she has a divergent view point but, on the other hand, I would add that you are certainly not barred from doing so.

One of the problems of sitting in a central management agency like GSA and administering a program of this nature is that we do not have the detailed and technical knowledge, for example, in the AIDS Commission or any other commission set up by the President or an agency, and we look to the head of that agency to certify to us that there is balanced representation on that particular committee.

Chairman GLENN. Yes, but you are the ones that—they have to file with you in order to form a commission like this. What you are doing with the rule I quoted from, you are setting out the final rule that guides them on how they in turn set the commission up. Granted, you do not have expertise in all of these areas, but your directions to them are used when a commission is set up, and one of the guidelines prior to this new rule was that there would be balance on this.

Now, this new final rule would appear to undercut the previous rule. What was the reason for this change?

Mr. WEISS. The final rule still provides that agencies shall provide balanced membership. I think that what we do is to give them more latitude—we do not have such a heavy hand in defining what those outward limits of balance or boundaries of balances are.

As we have heard this morning, you can balance a committee to extremes. I think what GSA's point was to let the agency make the final call as to when the committee was actually balanced. FACA does not——

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[1] See p. 239 for text of rules.

Chairman GLENN. What you said was that the rule, as you put it out finally—and I will quote it again—"does not compel the selection of any particular individual or group to obtain divergent points of view."

Mr. WEISS. That is correct, Mr. Chairman, the rule does not compel them, but on the other hand does not bar them from obtaining those divergent points of view.

Chairman GLENN. But the prior language required it. We have a document which shows that this change was made basically to minimize the chance of a lawsuit against a committee by people having points of view not represented on the committee. It seems to me that the adoption of this recommendation, the way it has been implemented, is not consistent with congressional intent to have a broad representation of views. It goes against that. Was it because of——

Mr. DEAN. For example, Senator, if someone brought a lawsuit, say, a frivolous lawsuit to obtain membership on a committee simply because they have a divergent viewpoint, I do not think the agency should be compelled to place anyone and everyone on a committee simply because they disagree with the agency in some way.

Chairman GLENN. Well, this exact language, it turns out, in a Department of Transportation letter to you, which you are probably familiar with, in which they recommend a revision of this section, this subsection, suggesting, "It is suggested that the provision concerning divergent points of view be reviewed as follows: This shall be construed neither to limit the participation nor compel the selection of any individual in order to obtain divergent points of view that are relevant to the business of the advisory committee." That is the language suggested.

Now, to further quote from this letter, in the next paragraph: "This change is recommended to diminish the threats of lawsuits by special interest groups or individuals who maintain they are required to be included in the membership of an advisory committee solely by virtue of their points of view."

So, the language you used was the language, absolutely the language right out of the Department of Transportation letter. Now, when FACA was being discussed some years ago, some of the testimony we had here—Senator Percy was on the Committee at that time—said that the intent of the Committee was that it not "be biased toward one point of view or interest, represent a broad range of interests," and things like that. We wanted a balanced view of these things.

It would seem to me that what you have done with this rule change is undercut our intent, and we were not aware that this had been done, we were not advised about it, as the oversight committee. So what you did with the 1987 final rule, is drop a 1983 requirement that the agencies consider for membership "a cross-section of persons or groups with demonstrated professional or personal qualifications or experience."

I think you are treading on a little thin ice when you delete instructions to agencies to consider a cross-section of persons with demonstrated qualifications, and that is in effect what the final rule has done.

Mr. **Dean**. It certainly was not our intention, Mr. Chairman. The intent was to provide maximum flexibility to the agencies to look at that entire universe and not to deny anybody membership on a committee, also not to compel.

Chairman **Glenn**. Well, if that was not the intent, it is the way it can be interpreted, it seems to me, and I would ask you to go back and reconsider this rule and we would be glad to work with you on it. Will you reconsider that?

Mr. **Dean**. We will.

Chairman **Glenn**. OK. Good.

What this change did in effect, just to carry this one step further, as you said, is give the agency total discretion. Now, an agency head, depending on who that agency head may be, may be a fine person, they may try and set out to get a balanced view on this, but they also may be totally hard over, one way or the other on the scale of 1 to 10 on whatever the issue is. They may—sometimes we have seen in the past committees, commissions, councils, advisory groups that in our opinion were put together to substantiate or to get not a balanced view on a certain issue, but were put together basically to give some credibility to a preconceived view of an administrator so they will rubber stamp whatever it is and give him a credibility he maybe did not otherwise have.

I am not saying that is the case in the AIDS Commission, I am not even giving any examples, but that is the problem when you get away from the balanced requirement. You let them misuse the committee, council, commission process to give a preconceived idea a legitimacy it would not otherwise have, and that is what we are trying to protect against.

Mr. **Weiss**. I understand your concern, Mr. Chairman. I think it really does amplify the concerns expressed earlier today about the need for a definition of what constitutes balanced membership.

Chairman **Glenn**. And we need to get back into this, too. I do not think we have properly defined it and I am not sure we can, but I am going to try and we are going to work with you on it because you are the ones that have to oversee this when it is put into effect in the executive branch.

Mr. **Weiss**. We would be very happy to work with you on it.

Chairman **Glenn**. In general, the public is informed about the work of the advisory committees by either attending the meetings or reading their reports. During this administration, the committees have issued fewer reports and closed more of their meetings. Let me give some examples.

In 1980, almost two-thirds of all advisory committee meetings were completely open to the public. By 1986, the percentage dropped to less than one-half. A similar trend occurred regarding the total number of reports issued each year. What has been the reason for this?

Mr. **Dean**. Mr. Chairman, if I may——

Chairman **Glenn**. How come they are less accessible to the public over the past 6 years.

Mr. **Dean**. The statistics are a bit distorted on that. The changing nature of advisory committees has been such that we are seeing more committees being formed to address highly technical issues, particularly in the defense area, or in grant review, peer review areas that lend themselves to the exclusions under the Government in the Sunshine Act.

When we looked at those numbers and went back and tried to look at the five major agencies, for example, that held a disproportionate number of closed or partially closed meetings, and when we factored those numbers out of the baseline data, we found that for the majority of the 53 or so agencies, requiring that the trend was the complete reverse, that for the remaining agencies the number of open meetings was actually increasing quite substantially.

We are not in a position to pass on the validity of whether these meetings were properly closed or not, but on the surface it seems that, for example, in NIH or HHS, where they are dealing with grant reviews, that many of those meetings are appropriately closed.

With the reports, sir, I think that we are also seeing the same trend has been affecting that. We are getting away from some of the more general types of advisory committees that provide management advice, many of the committees that were prevalent, say, in 1977. As you get into some of the grant review committees, they do not issue reports per se, because they are not studying problems, they are not issuing formal findings. They are passing on grant review applications and so forth, no reports per se. So it depends on how you define reports.

Chairman GLENN. OK. The ones that have the most closed meetings are chartered by a handful of agencies, DOD, HHS, Commerce, VA, National Endowment for the Humanities and Arts, and the National Science Foundation.

Now, according to our figures, DOD, HHS and Commerce had more closed meetings during this period, while VA and NEA, NEH, NSF either stayed constant or had more open meetings, so you have got it narrowed down a little bit there and I am not saying all of these closures are not justified, but it is something that we start to look at with a jaundiced eye when we see that trend occurring.

Mr. WEISS. That is exactly correct, and the more we see this kind of data and the more we have access to it, we will be able to do the kind of analysis I think that you are looking for in terms of the reason.

Chairman GLENN. Does the administration send up proposed legislation every year which identifies those committees which can only be eliminated by statutory action, along with the specific reason that such action is recommended for each committee? Do we get a copy of that? I think we are supposed to under FACA, are we not?

Mr. WEISS. Mr. Chairman, the function of identifying committees which must be terminated through legislation has been pretty much left to the agencies themselves.

Chairman GLENN. OK. I think it requires, section 6(c) of FACA requires GSA, when preparing the President's annual report on advisory committees, to include a list of those statutory committees recommended for termination, together with the reasons therefor, and that has not been included in the annual report.

Mr. WEISS. Mr. Chairman——

Chairman GLENN. Well, what staff tells me here is that on the report that you send up on this, for instance, here is one here where it says that the status of Federal advisory committees recommended for termination during fiscal year 1986, and we have different groups here, it says requires legislation, but the reason for that and justification for why you want to undo that or disband that particular group is what we need, I guess.

Mr. WEISS. That is correct, it is not in the summary, the annual report summary.

Chairman GLENN. I was told that we do not get separate letters on any of these, either. Is there a summary—do you send a separate document or are you supposed to send a separate document that gives us that?

Mr. WEISS. The reason, Mr. Chairman, for proposing a committee for termination are contained in the more detailed information that we provide to the Senate and the House as part of the annual report process and as part of the annual comprehensive review. If the committee proposed termination through legislation, the reasons for that are outlined in the——

Chairman GLENN. OK. If that is contained in something else, I would like to have the staff get in touch with you and make sure that we are either getting that information or that we want it submitted with the annual report, one or the other.

Mr. WEISS. OK.

Mr. DEAN. Mr. Chairman, I would like to clarify. This is the summary of the annual report required by FACA. It is not the annual report itself. You do receive this from the President, but the much more detailed information taken together with this report constitute the annual report of the President.

Chairman GLENN. Who does that go to?

Mr. DEAN. In the Senate, it goes to the Senate Governmental Affairs Committee. We sent up several boxes of material to you for these hearings. And on the House side it goes to the Government Operations Committee.

Mr. WEISS. Literally, a stack of——

Chairman GLENN. Well, I would like to have the staff, without taking up the Committee's time—we are late here and it is 20 of 1, so I would like to end this up pretty soon here, so maybe staff can get together with you and make sure we are getting everything we need to do our job, too.

Do you think an agency head should retain final authority over establishing an advisory committee.

Mr. WEISS. Yes, I believe so.

Chairman GLENN. And the termination of it?

Mr. WEISS. If it is a statutory committee or one that the agency head, him or herself, establishes?

Chairman GLENN. Primarily the statutory ones, I guess.

Mr. WEISS. We have suggested in our statement to you that FACA, of course, has to be amended to provide for that. But we recommend giving the agency head the authority to terminate a committee provide that he or she consults with the congressional committee, with the Congress, and also advises the Secretariat.

Chairman GLENN. Your data on advisory committee management indicates that less than one percent of committees proposed for establishment result in a nonconcurrence from a Committee Management Secretariat. I presume a non-concurrence is where you just disagree with the establishment of the committee and refuse to charter it, is that correct?

Mr. WEISS. That is correct.

Chairman GLENN. Does GSA in every instance confer with OMB on an agency proposal for establishing an advisory committee?

Mr. WEISS. No. We do confer with OMB in those cases where we feel they can lend something to the deliberative process and where there is a duplication across government that we may not be aware of, we feel that OMB might have information and——

Chairman GLENN. Can you give us an idea of what percent of cases does GSA confer with OMB under, and on what types of commissions?

Mr. DEAN. It has varied over the years, Mr. Chairman. The practice which has been maintained by the Secretariat since its arrival in GSA, the consultation with OMB or assistance from them was primarily carried over from the time that the Secretariat was in that location.

Since I have been with the Secretariat for the past nine months, we have much more selectively relied upon OMB, I would say probably say fewer than 5 percent of the establishments that we get, I have asked for some input from OMB on.

Chairman GLENN. Do you prepare recommendations concerning the continuation or termination, either one, of committees for OMB's consideration during the preparation of the budget?

Mr. DEAN. No, sir, we do not. However——

Chairman GLENN. Do you not think you should on that? Is that something that should be done, because it involves some dollars of a substantial number?

Mr. DEAN. We are a little bit out of sync with the budget process itself. However, we are considering an initiative beginning this year to take more initiative in discussing with the agency our feelings about various committees. What we would like to do is to resolve any outstanding issues with the agencies before we provided any information to OMB.

Mr. WEISS. If I could elaborate just a little bit, Mr. Chairman, OMB has undertaken a process over the last couple of years of what they call their management review in which they look at every program within the agency that is broad in scope and rises to their level. As part of that review, as part of my responsibilities, we will begin sharing with them once we have got the data we can rely on, based on our new system, we will begin sharing with them information from this process that we feel they should have in their budget deliberations on advisory committees.

Chairman GLENN. Well, on the whole committee-commission process here, we are up to—what was our total figure now—$86 million or—what is our total cost? So, we are $80-million-some on this, and it would seem to me that would have to show up in your request to OMB, and I would think there would have to be justification for that figure, so you would have to review these things every year when you submit them to OMB.

Mr. DEAN. It shows up in each agency's request, that is funding it. You see, that is where the two do not go together.

Chairman Glenn. You do not approve them, out of yours, I see.

Mr. Dean. Each agency funds its own committee, so therefore it comes up through that process.

Chairman Glenn. OK. Have you ever recommended to OMB that a committee be terminated or continued, either one, and the agency disagreed with your recommendation?

Mr. Weiss. Not to my knowledge, Mr. Chairman.

Chairman Glenn. Who is the final authority, you or OMB, in that case?

Mr. Weiss. In recommending a termination? If it is in the budget process, I would say it is probably theirs.

Chairman Glenn. It has never occurred, and I guess it is academic, but I was just thinking of who has the final say on that one.

Mr. Dean. Well, I believe that the head of the agency has the final authority to terminate. However, OMB has been known to strongly recommend that some things take place——

Mr. Weiss. Not only in this area, but others as well.

Chairman Glenn. Well, the OMB head comes before this committee on occasion, too. I have been told by different ones through the years that people look at the Vice President as being the second most powerful spot in government, but I do not agree with that at all. I think the OMB head is the number two man in government, because they make more decisions directly affecting what happens in government than anybody except the President, as I see it, but that is an aside.

The Secretariat function used to be in OMB back years ago and it was transferred over to GSA and you administer it now. Removing yourself and your previous prejudices from it, do you think that that was right to do that? It is a rather—just on the surface of it, it would appear that perhaps OMB is the more logical spot for the Secretariat. It was moved over to GSA, I guess because you have a lot to do with logistics and supporting all of these different groups and so on. Do you think it should be with GSA or should the Secretariat be moved back to OMB?

Mr. Weiss. Well, trying to remove myself from it and be objective about it, I have only supervised this program for the last two years, so I can be fairly dispassionate, I think. I think at the time it existed in OMB, it was able to draw on resources within the Office of Management and Budget that obviously were not available in GSA, the budget examiners, for example.

Since that time, however, it has come to GSA and over the last 2 years we have been working with the Committee Secretariat to enhance its capabilities, I think that the level of expertise is going to improve, I think the level of analysis, the depth of analysis is going to improve, and I think that you are going to see a much more enhanced committee management process coming out of GSA over the coming years.

So, I would have to say, based on the plans that I have seen for it, I would leave it where it is, within GSA. And as another aside to this, I do not believe OMB would have the resources to devote to it. As you know, they are so caught up in the budget process and other things, that I believe this would fall pretty low on their list of priorities.

Chairman **Glenn**. Is the OMB staff looked at as being part of the White House staff?

Mr. **Weiss**. They belong to the President, yes, in that sense.

Chairman **Glenn**. Since it is run out of the Office of the President.

Mr. **Weiss**. Yes.

Chairman **Glenn**. I think, if we are recalling correctly, that is how this whole thing occurred. It was part of President Carter's pledge when he was running for President that he was going to cut down the size of the White House staff, and this is one place he whacked at once he got in. Since OMB was part of the White House staff technically, he transferred them over to a different agency of Government. It did not change anything as far as the overall budget or anything, except it got the Secretariat off the White House pay roll, I guess. Is that what happened, or do you know?

Mr. **Weiss**. I have heard the same stories you have, Mr. Chairman. The number I think was five or three positions moved out, three at the time, which is almost insignificant.

Chairman **Glenn**. All right. Well, thank you very much.

Do any of the staff people have any additional questions to ask?

[No response.]

Chairman **Glenn**. Fine. It has been a long hearing and we appreciate you sticking with us here this morning. It has been good testimony. We may have additional questions from staff or Senators who were not able to be here this morning, and we would appreciate an early reply so we can include those in the record, and we want to work with you on making this whole thing work better.

Thank you very much.

Before recessing, there are several statements and documents that we will have printed in the record.

Thank you all.

The Committee will stand in recess subject to the call of the Chairman.

[Whereupon, at 12:50 p.m., the Committee was in recess, subject to the call of the Chair.]

APPENDIX

Statement of Michael H. Cardozo

My involvement in the Federal Advisory Committee Act (FACA) started with my serving as a consultant to the Administrative Conference of the U.S. During 1979 and 1980 for the purpose of preparing a report on the operation of the first fifteeen years of the FACA. My report was considered at the Conference's plenary session in June 1980; it has also been published in the Winter, 1981, issue of the Administrative Law Review. A number of other studies and reports have been completed and published, all contributing to the effective functioning of the advisory committee system.

New and Important Committees

The importance of the Federal Advisory Committee Act is exemplified by the continual establishment of new committees to deal with emerging problems and crises and by the strength of feeling on issues arising out of operations under the Act. Each year as many new advisory committees are being created as are dissolved. Right now there is litigation involving the operation or status of the Presidential Commission to study the AIDS epidemic and the Committee on Judicial Selection of the American Bar Association. In the recent past the Commission of the Three Mile Island Accident and two Commissions on Obscenity and Pornography have dealt with those critical subjects. Only last month the President created a "task force" to advise on the stock market situation.

Advising in Secret

The Act was introduced and enacted because of a perception that important government decisions were often being made on the strength of advice received from representatives of powerful special interests without the benefit of views from other persons, especially those who would be representative of the public interest. Committees with members from major industries had been organized without public announcement, and had been meeting with government officials involved in supervising or regulating the industries represented. It was also evident in 1972 that hundreds of committees were advising almost every government department and agency. While most of them did not have the dangerous characteristics of the industry-oriented ones described above, there was concern that they were costing the government more than was justified and might not be serving a function that warranted their continuance. After thorough hearings about these concerns, the Federal Advisory Committee Act was enacted in 1972. The Act established a regime of control of "advisory committees", which was defined generally as any group of private individuals convened by an agency of the government to meet with representatives of an agency of the government for the purpose of "obtaining advice or recommendations."

Regulation by the FACA

The principal provisions of the Federal Advisory Committee Act called for registration, with a designated government office, of a charter stating the functions of the committee and area of its advisory responsibility; a proper "balancing" of membership among various interests; meetings announced in the Federal Register, and, with specified exceptions, open to the public; and preparation and making public of reports of all meetings and activities, including keeping all standing committees of Congress informed of those activities.

Value of Advisory Committees

In recommending enactment of the Act, the Congressional committees expressly recognized that advisory committees can provide "a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost." They were also characterized as "a contribution by the governed to the government," because very few of the members of advisory committees receive any compensation for their services. Concern about cost, however, has recurrently arisen, largely because of the number of committees in existence at all times and the number of persons serving on those committees. This has led to recurring questions about the longevity of some committees and what means can be used to assure termination when their work is completed.

When the House Committee started to consider legislation, about 1,800 committees were known to exist, with over 25,000 individual members. It seemed to many members of Congress that so vast an operation, involving so many people, must be expensive and should be controlled. After the Act was passed, efforts to reduce the numbers succeeded in diminishing them, so that five years later there were half as many committees and far fewer individual members. A recurring question is how to abolish committees established by express provisions of legislation. Reductions in numbers of committees, however, do not necessarily mean any significant saving in costs, as most advisory committees involve very little direct expense. Also, as noted before, the advisory committee system is actually a means of obtaining valuable skills and experience for government operations that would be far more expensive if obtained through the use of consultants and salaried employees.

Charters, Open Meetings, Balanced Membership

Since the enactment of the FACA the advisory committee system has continued to serve the Government well. In addition, the Act has unquestionably improved the system. The requirement of the filing of charters enables the public to know when a committee has been created. The published notices of meetings, whether open or closed, assure some public access to the proceedings. The requirement of "balance" in the membership prevents excessive influence by single, special interests, avoids many questions about conflicts of interest among committee members, and assures that persons affected by committee actions can participate in the deliberations. In the overwhelming number of instances, this entire system works in the public interest without undue burden on the agencies involved.

Not surprisingly, there have been some problems in administration of the system.

Peer Review: Open or Closed Meetings?

There is a widespread custom of closing meetings where choices are made among applicants for grants and contracts, sometimes known as the "peer review" process. Many members of committees charged with making that kind of decision demand closed doors because of their inability to state candid opinions about candidates if their statements are likely to be heard by or repeated to the candidates. This raises questions of fairness to the candidates, who lose the opportunity to present evidence contradicting adverse information aired at a closed meeting. It also interferes with efforts by excluded people to assure a proper spread of awards among institutions and nationwide regions.

Definition of "Advisory Committee"

One of the most troublesome questions has involved the definition of "advisory committee", determining the scope of the Act. Much difference of opinion arose over the so-called "one-time meeting." Did Congress intend to include a gathering of a few selected individuals at the instance of an agency head to discuss the handling of an immediate emergency confronting the agency? Could the Attorney General, without chartering and public notice, invite three or four law professors to his office to discuss the ramifications of an incident involving criminal law and the Constitution? If not, the Government is obviously hampered in obtaining the kind of advice that can help to solve a difficult problem. Many commentators have felt that a group of individuals, convened one time without committee structure and without any continuance as a group, are not a "committee" as that word is used in the Act. On the other hand, it may be in the public interest for the composition of such a group and the nature of the meeting to be made public.

Similarly, a group of individuals affiliated with some organization, such as a university, convened spontaneously for the purpose of conducting research and preparing a report on a matter of interest to a government agency, does not look like a committee "established or utilized" by the agency, even if a report from the group is studied and implemented by the agency. It would be highly impractical to declare the whole University, for example, an advisory committee and subject to the Act. An argument can be made that the group in that case is not "established or utilized" by an agency as Congress used that expression in the Act, and the group is not a "Committee" as defined in the Act.

Operational and Sub-Committees

The reason for pressure to include various kinds of groups and meetings in the coverage of the Act is the need for the public, and particularly public interest groups, to have an opportunity to know what's going on in the Government and to make their desires and views known to those who make the decisions.

Questions have arisen, for example, concerning the so-called "operational committees" and subcommittees. The Act specifically exempts committees that are "operational" rather than "advisory". Under that heading, the Commission on the Bicentennial of the Constitution and the Board of Foreign Scholarships have operated outside the FACA. Subcommittees that report only to the parent committee are generally considered to be exempt from separate chartering and supervision. Subcommittees that report to the agency that established the parent committee, however, are thought to be properly covered separately, requiring published notices of meetings and openness.

Follow-Up Oversight

Although the advisory committee system is widely accepted as useful, economical and generally well managed, one significant weakness has troubled observers: there is no effective procedure for follow-up to assure full consideration and implementation of the recommendations and proposals of the many expert and experienced committee members. Often, as Lloyd Cutler remarked in 1970, committees "burst on the scene and then pass from public view-like comets, only to appear again in much the same form years or even decades later." He was alluding to the successive commissions created to consider crime and law enforcement: Wickersham in 1930; Katzenbach in 1965; and Eisenhower (Milton) in 1969. Later examples are commissions on pornography and obscenity of 1970 and 1985.

The waste of effort, money and expertise represented by the relegation to obscurity of these studies might be prevented by assigning oversight of follow-up to an appropriate place in the government. Congress, in the original Act, assigned it to the OMB. The annual President's reports to Congress might be a good medium for this kind of oversight, especially if the concerned Congressional committees took note of them.

The Committee on Governmental Affairs is probably concerned with the question of the need for amendments to the FACA as a means of dealing with the kinds of questions described above and with better means of enforcing its provisions. Some of those concerned with the administration of the Act have recommended amendments. Others feel that the problems can be solved by proper general regulations, by separate agency action or by due attention in the president's domain. Our testimony during these hearings is intended to help the Committee to decide among these different views.

I am happy to have had the opportunity to introduce the subject.

QUESTIONS FOR MICHAEL CARDOZO
FROM SENATOR WILLIAM V. ROTH, JR.

1. In your testimony, you mentioned the controversy over whether a "one-time meeting" falls within the ambit of FACA. In his testimony, Mr. Gliztenstein suggested that where Federal officials simply gather a number of individuals together, and do not direct them to develop consensus advice on a particular issue or topic, then an advisory committee does not exist. Do you believe that this formulation gives sufficient guidance to agency officials and should we insert such a clarification in the FACA?

I agree with Mr. Glitzenstein's formulation. I would add, however, the test of structure: If the gathering of individuals is not structured with the trappings of organization, such as continuity, officers such as a chairman or presiding member, and an assignment of function, it is not a "committee" within the intent of the Act. Since the Act contemplates only groups with those characteristics, no amendment is needed. The regulations promulgated by the responsible agency can clarify the matter, as, indeed, seems to have been done in the current GSA regulations.

2. There has been criticism of the number of closed advisory committee meetings. How much of this criticism do you feel is justified? Could you give us some examples of closed meetings which you think unjustified and explain why?

The chief committees that I have observed as regularly closed are:

(a) Those deemed to be "operational" rather than "advisory" and therefore outside the Act by virtue of Section 9(b) of the Act and Section 1001-6.1004(i) of the Regulations.

(b) Committees involved in "peer review" of individuals' qualifications for a grant or position.

(a) Examples of committees treated as "operational" are the Bicentennial Commission on the Constitution and the Board of Foreign Scholarships, now in USIA, formerly in the Department of State.

The Bicentennial Commission is probably more undeniably "operational", and not "advisory," than most groups so labeled. I do not perceive any reason, however, why it was important to the success of the Bicentennial Commission to have closed meetings. Consequently, as far as that committee is concerned, I see no need for the Act to exempt "operational" committees from the requirements of the Act.

(b) "Peer review" committees include many that select individual grantees for programs like the Fulbright educational exchanges and others that select organizations, such as Universities, to receive grants and contracts awarded out of appropriated funds. Those meetings are generally closed because of apprehension that committee members will be reluctant to express adverse and critical views about the applicants if those views are to be made public and accessible to the applicants. There is validity to the apprehension.

On the other hand, the result of closings is that applications are denied for reasons that the applicants do not know. Sometimes the reasons are invalid, and the applicant, if aware of the allegations, could refute them. It would be more fair to the applicants if they were given a chance to respond to adverse comments made behind closed doors. A possible compromise might be to report, prior to final decision, to the applicant the results of the consideration given in a closed meeting, with the reason for an adverse decision but without identifying the person whose views prevailed.

3. Mr. Glitzenstein stated in his testimony that the high profile, "blue ribbon" committees highlight the role that FACA plays. But, don't the many lesser-known committees highlight a different problem; that being assuring the accountability of such committees and terminating them when they are no longer needed?

A. Do the agencies do a good enough job of weeding out their own committees?

B. Does GSA have enough clout to force such scrutiny in the agencies?

Accountability should be covered adequately in the annual review required to be conducted by the GSA (formerly OMB) and other requirements of public access to reports, minutes, and records.

Termination for committees other than those created by statute is required after two years if a committee is no longer needed. That should assure proper termination of unnecessary groups, especially since the Committee management officers have no desire to encumber their offices with obsolete functions.

Committees established by Act of Congress present a different problem. If they are no longer needed, generally provision for termination must be inserted in some legislative action. However, even if nothing is done, an obsolete Committee can continue in technical existence without costing the Government any money. Consequently, insertion of a workable, general termination procedure in the FACA seems unnecessary and possibly very complicated. A brief sentence in legislation related to each separate agency, such as an appropriation act, would be better.

4. Regarding the balanced membership requirement, it seems to me that balance on a particular advisory committee is going to turn upon the functions to be performed by the particular committee. Accordingly, it seems to me that the Act's requirement that Committees be fairly balanced in terms of points of view represented and functions to be performed provides as much guidance as possible given the infinite variety of functions that particular advisory committees might be called upon to carry out. Could you comment on that?

To assure representation on committees of every interest that could be affected by a group is impossible. I think "balance" should mean representation of every special skill or technical knowledge required to cover all the aspects of subject of the committee's responsibility. The interests of those potentially affected by the deliberations should be protected by the openness requirement of the Act. Those interests can be covered by attendance at committee meetings and access to reports and minutes. How those interests are protected when a meeting is legally closed is, of course, another matter, but it cannot be solved by enlarging membership of committees to embrace every interest.

An example of the problem of complete "balance" is the Committee on which I served for many years: the Secretary of State's Advisory Committee on Private International Law. The members were persons with special competence in private international law, either through scholarly research, teaching, judicial service, government legal positions or otherwise. Afffected by the Committee's deliberations were such diverse interests as hotel chains, operators of ships and aircraft, business in export and import activities, divorced parents of kidnapped children, and so forth. The Committee actually invited to its meetings people with special competence in those subjects when they were to be considered. To have them all on the Committee would have created an impossible body.

Senator Roth's view of "balance" seems entirely correct.

TESTIMONY BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
HEARING ON THE FEDERAL ADVISORY COMMITTEE ACT

December 3, 1987

My name is Paul G. Dembling. I am presently a partner in the Washington office of the law firm of Schnader, Harrison, Segal & Lewis. During my Government service, I served as General Counsel of the General Accounting Office, the National Advisory Committee for Aeronautics, and the National Aeronautics and Space Administration.

My interest in the Federal Advisory Committee Act ("FACA") was peaked in 1983 when, as President of the Federal Bar Association, several individuals in and out of Government suggested the convening of a select committee to review the Federal Advisory Committee Act and the Interim Regulations which had been issued by the General Services Administration ("GSA").

As I was considering this suggestion I spoke with a number of individuals. I quickly learned that there was much difference in the interpretations of the provisions of the FACA, opinions varied on the Interim Regulations, and that certain portions of the Act had turned out to be ambiguous in practice. It appeared that specificity and guidance were needed.

There was unanimity of opinion that the Federal Bar Association should convene a forum for discussion and review of FACA, since at that time a full scale Congressional review was not imminent, and agency officials had immediate problems.

I appointed the Committee with a balanced membership. A report was ultimately rendered by the group.

Mr. Chairman, I am pleased that this Committee has undertaken its FACA review and I am happy to have been asked to testify. I hope I can make a contribution.

Advisory Committees are an important and cost effective part of the federal government. The collective impact of these committees is enormous. Each year over 20,000 individuals, through approximately 1,000 separately organized committees, provide advice on virtually every aspect of federal government activity. The purpose of this committee structure is to avail the government of expertise that is not readily available otherwise. The cost of this advisory committee apparatus is relatively small compared to the equivalent costs in the open market for the services of the accomplished and knowledgeable individuals on the committees. The impact of their advice ranges from choices among major long-term government policy options in critical problem areas, to decisions affecting major programmatic and expenditure decisions in most federal agencies.

FACA is an extremely important statute. It provides the structure whereby public officials can balance the need for the government to obtain advice and yet obtain that advice in an open fashion. The law provides the mechanism for obtaining consensus advice and expertise. FACA was originally enacted because Congress became concerned of the Advisory Committee system. It was an important first step in providing basic protection and guidelines for operation of advisory committees. However, because Congress and the Executive Branch were essentially learning how to deal with this problem for the first time, the Act was left with several rough spots.

Over the years these uneven spots have led to subtle distinctions in interpretation, to differences in agency practice, to litigation, and to uncertainty on the part of senior public officials desirous of establishing committees and obtaining advice. These uncertain items have included

- the meaning of "utilized" in the Act as regards a committee.
- the definition of what constitutes an "advisory committee."
- the applicability of the Act to "subcommittees," "task forces," and "working groups."
- the requirement for "balanced" membership in terms of committee purposes and affected interests.
- the extent of independence and the manner in which agency "support services" would be provided to Presidential committees.

FACA now permits a great deal of flexibility in interpretation. This has resulted in differences in approaches and operations by various agencies. I believe that the clear intent of the Congress regarding these matters should be expressed.

The requirement for a central government agency "consultation" on the decision of a cabinet officer or agency head to create an advisory committee should be eliminated. An agency head has responsibility for major expenditures and program operations. It is reasonable and logical for him or her to have authority to make a judgment regarding the need for outside advice, to constitute a committee, and to determine its scope and charge. The agency head can be held accountable for the actions within his or her agency. Also, the agency head should account for the actions taken regarding the recommendations and advice received from advisory committees established in the agency.

If there is any central government review function it should be to determine actions taken as a result of the committees' recommendations and to determine the general compliance with the provisions of the Act regarding openness of process, balanced membership, and freedom from undue influence either by outside interest groups or by particular agencies or officials within the government. These requirements are currently in FACA.

The monitoring of FACA compliance is very different from the policy and programmatic decision to create a committee. The creation process should be streamlined, straightforward and in the hands of the agency head. The monitoring process can be done in the manner of an audit, across agency lines, and it should be performed independently.

The results of such reviews should assist the Congress in its oversight function on advisory committees.

FACA should provide for agencies to obtain a definitive interpretation of the Act from a central recognized source. The Department of Justice has generally occupied this position but not for FACA. GAO continues to exercise its role where a question of the expenditure of funds is involved. The Congress placed the FACA responsibility with the Office of Management and Budget in 1972, With the transfer of that responsibility to GSA, the need for an authoritative legal interpretive office arose.

It is noteworthy that the administration of FACA began in the 1970s with a joint Department of Justice/OMB memorandum published in the Federal Register. This memorandum was later withdrawn in favor of more general guidelines published in an OMB Circular which were maintained on a current basis.

There is need for greater clarity in the Act's provision that an assigned agency will provide "support services" to Presidential Advisory Committees (i.e., those with a charge to advise the President). The specific duties to be exercised by an agency with responsibility to provide "support services" to a committee assigned to it has been ambiguous. Some agencies have interpreted the support services function to permit control of the committee's activities, whereas others have viewed the agency role as purely ministerial. It appears that the Congress may wish to speak to this matter.

FACA's ambiguities have led to different interpretations regarding what may or may not be exempted from coverage. The Act provides certain specific exemptions (Sections 3 and 4). Through interpretation and agency practice, these have included various activities. Exemptions have been provided for "task forces", "subcommittees", committees with "operational" responsibilities, committees which are engaged in "fact-finding," committees which do not provide "consensus" advice, etc. If the Congress desires another result it should clarify the language of the Act.

Thank you.

United States General Accounting Office

GAO

Testimony

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The President's Commission on AIDS

Statement of
Rosslyn S. Kleeman, Senior Associate Director
General Government Division

Before the
Committee on Governmental Affairs
United States Senate

Mr. Chairman and Members of the Committee:

We are pleased to be here today to discuss the progress of the work we are doing at your request on the Federal Advisory Committee Act (FACA). In considering and passing FACA in 1972, Congress endorsed the concept of using committees of private citizens to advise federal officials in the exercise of their responsibilities, recognizing that this mechanism could make available information, perspective, and insight to the formulation of public policy. The FACA, Public Law 92-463, as amended, prescribes uniform procedures for the establishment, operation, administration, and termination of advisory committees. During fiscal year 1986, the General Services Administration (GSA) reported that 56 departments and agencies sponsored 997 advisory committees at a cost to the agencies of about $82.5 million. According to GSA, the 997 committees had a total of 24,600 members, held 3,519 meetings, and issued 666 reports.

On September 21, 1987, you requested that we undertake a study of the operations of advisory committees within a number of departments and agencies. In subsequent discussions with your office, we agreed to focus initially on (1) compliance with FACA and GSA regulations by advisory committees at the National Institutes of Health (NIH) and the Food and Drug Administration (FDA), and (2) the formation and initial operations of the AIDS Commission.

Progress of our work at NIH and FDA

NIH has 162 federal advisory committees. In 2 committees, members are appointed by the President; in 30 committees, members are appointed by the Secretary, HHS; and in 130 committees, members are appointed by the Director, NIH. These committees function as either scientific review groups or program advisory groups. Scientific review groups are to be composed exclusively of experienced investigators with highly developed expertise in specific scientific disciplines or medical specialty areas. Their primary function is to determine the scientific merit of research grant applications and contract programs. Program advisory groups are to be composed of biomedical scientists and leaders in such fields as education, law, social studies, public health, and public affairs.

To date, we have obtained data for 1986 and/or 1987 for six NIH advisory committees--two scientific review and four program advisory groups. So far we found that:

-- The charters contained all the elements required by FACA.

-- Announcements of advisory committee meetings were published in the Federal Register 15 days in advance as required by GSA regulations.

- -- Minutes of meetings for 1986 contained detailed information about matters discussed and actions taken as required by FACA and GSA regulations.

We only recently began work at FDA. So far we have held entrance conferences and have begun to interview FDA officials. We have obtained documents on FDA's management of advisory committees and selected six advisory committees to see if they adhered to FACA requirements.

We will report to you on FDA and NIH work at a later date.

Results of our Work at the President's Commission on AIDS

On June 24, 1987, the President signed Executive Order 12601 which established the Presidential Commission on the Human Immunodeficiency Virus Epidemic -- commonly known as the AIDS Commission. The Order specified that the Commission should:

- -- have 11 members whom the President appoints or designates, with one serving as Chairman, and who are distinguished by their experience in medicine, epidemiology, virology, law, insurance, education and public health.

- -- advise the President, the Secretary of HHS, and other relevant Cabinet heads on the public health dangers, including the medical, legal, ethical, social and economic impacts from the virus and resulting illnesses.

-- recommend actions that federal, state, and local officials can take to: 1) protect the public from acquiring the virus; 2) find a cure; and 3) care for those who have the disease.

-- 1) evaluate efforts to provide education and information on AIDS; 2) analyze efforts to combat AIDS; 3) examine the long-term impact of AIDS treatment on health care delivery systems; 4) review how the U.S. has dealt with communicable disease epidemics; 5) evaluate research on AIDS' prevention and treatment; 6) identify future research to address AIDS; 7) examine policies for developing and releasing drugs and vaccines to combat AIDS; 8) assess the progression of AIDS among the general population and specific risk-groups; 9) study legal and ethical issues on AIDS; and 10) review the U.S. role in dealing with AIDS in the international setting.

-- make a preliminary report to the President not later than 90 days after its members are first appointed or designated, and submit its final report no later than one year from the date of the Order.

-- terminate, unless extended, 30 days after submitting its final report to the President.

The Order allowed Commission members to be compensated for their work at the daily rate of GS-18, and for travel expenses. It also required the Office of the Secretary of HHS to provide administrative support services, staff and funds as needed for the Commission to perform its functions. Heads of executive departments and agencies, to the extent permitted by law, are required to cooperate by providing needed information and administrative support.

Executive Order 12603, signed by the President on July 16, 1987, amended the initial executive order to increase the number of members on the Commission from 11 to 13.

On July 23, 1987, the Secretary of HHS signed the Commission's charter. Essentially, this charter restated the requirements of the amended executive order. The charter also specified, as required by FACA, other information on the Commission's structure and operation, such as:

-- The members shall be invited to serve for the life of the Commission.

-- The Office of the Secretary, HHS, shall be responsible for management and support services.

- -- Meetings shall be held as needed at the call of the Chair with advance approval by a government official, who also shall approve the agenda and attend all meetings. Meetings shall be conducted and recorded as required by law and HHS regulations.

- -- The estimated annual cost for the Commission is $1,350,000, including $950,000 for compensation and travel expenses of members and $400,000 for staffing at 8 staff-years.

Pending litigation

Currently, litigation involving the Commission is pending in National Association of People with AIDS v. Reagan, No. 87-2777 (D.D.C. October 14, 1987). On October 14, 1987, a coalition of civil rights and public health groups filed suit in the U.S. District Court for the District of Columbia, alleging that the AIDS Commission does not meet FACA's requirement that an advisory committee's membership be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. I., section 5(b)(2). Specifically, the plaintiffs' complaint alleges that the Commission lacks representatives of groups most directly affected by its work and includes some members whose "extreme viewpoints" are not balanced by those with "more mainstream views." The plaintiffs' complaint requests a declaratory judgment that the AIDS Commission is not fairly balanced, as well as an injunction barring the Commission from taking any further action until balanced membership is achieved.

On October 23, 1987, the Department of Justice filed its brief opposing the plaintiff's request for an injunction. Justice maintains that the Commission membership, as constituted, is balanced in terms of functions to be performed, and is drawn from a wide range of backgrounds and points of view. The district court has not yet issued a decision on the injunction.

Scope of our work

Because of the litigation, we agreed with HHS that, during our interviews with the Commission members and staff, HHS attorneys would be present and we would not ask questions about certain subjects which HHS attorneys believed were related to the litigation. Specifically, we did not discuss (1) personality conflicts between Commission members; (2) points of view of individual Commission members; (3) the substance of the Commission's work; (4) the selection and appointment of individual Commission members; (5) the qualifications of Commission members; and (6) the Commission's representation of particular groups or points of view.

We interviewed 10 Commission members, the former Vice Chairman, the former senior advisor for economics and international affairs, the former senior advisor for medical affairs, and an associate of the former Chairman who assisted him at the Commission. The former Chairman declined to be interviewed. We also interviewed Public Health Service officials about administrative support they provided to the Commission.

We examined contracts, purchase orders, and memoranda pertaining to administrative support provided to the Commission by HHS. We also reviewed minutes of Commission meetings, available personnel records of Commission members and staff and available memoranda exchanged between the former Chairman and Commission members.

AIDS Commission Compliance With FACA and GSA Regulations

Under FACA, federal agencies must meet certain requirements in establishing and operating advisory committees. These requirements and the actions taken with regard to them for the AIDS Commission include:

-- Designating a committee management officer who controls the establishment and operation of advisory committees. The Department of Health and Human Services designated

Mr. Richard Loughrey, Director, Advisory Committee Office as the Advisory Committee Management Officer.

-- Consulting with and filing a charter with the GSA for each committee established. The consulting requirement is not applicable to Presidential advisory committees. As required by FACA, the AIDS Commission charter contains (1) the Commission's official designation; (2) the Commission's objectives and scope of activity; (3) the period of time necessary to carry out the Commission's purpose; (4) the official to whom the Commission reports, (5) the agency responsible for providing the necessary support; (6) a description of the duties for which the Commission is responsible; (7) the Commission's estimated annual operating costs; (8) the estimated number and frequency of meetings; (9) the Commission's termination date; and (10) the date the charter was filed.

-- Maintaining a committee's documents available for public inspection and copying in one location. According to AIDS Commission representatives, documents are made available upon request. Our tests in this area were inconclusive.

-- Ensuring that a committee's membership provides balance in terms of points of view represented and functions to be performed, and is not inappropriately influenced by the appointing authority or special interests. Because the AIDS Commission's compliance with the balance requirement is the subject of a lawsuit, we did not review this issue.

-- Notifying the public, through the Federal Register, when and why a meeting will be closed to the public, and summarizing the closed meetings in an annual report. Only one of the AIDS Commission's meetings held thus far was closed to the public. Closure of the meeting was requested and approved on the basis that the Commission would be discussing internal personnel rules and practices and matters which, if disclosed, would constitute an invasion of personal privacy. However, the minutes of the closed meeting reveal that the Commission devoted very little time to discussing personnel matters. Instead, the primary topic of the Commission's discussion was the subject matter areas to be assigned to the Commission's subgroups.

-- Assigning to each committee a designated federal official who is to attend each meeting and adjourn meetings when doing so meets the public's interest.

The designated federal official for the AIDS Commission is its executive director. According to the Commission's minutes, three different people have served as the designated federal official at Commission meetings.

-- Drafting detailed minutes, the accuracy of which is certified by the Chairman, of each committee meeting with reference to attendance; matters discussed and conclusions reached; and reports received, issued and approved. We found that the AIDS Commission maintained minutes of its meetings. The Chairman of the Commission, however, did not certify to the accuracy of the minutes. By November 9, 1987, we had obtained the minutes of four Commission meetings that had been held up to that time: two were in final and two were in draft. As of November 30, 1987, the minutes of the two most recent Commission meetings were still being prepared.

GSA, the agency responsible for providing guidelines on and implementing the act, issued regulations (41 CFR Part 101-6) on advisory committee management in 1983. These regulations provide more specific guidance on the FACA requirements. For example, the regulations specify that

-- Agencies must develop a plan for attaining balanced committee membership. As mentioned previously, this requirement is currently the subject of a lawsuit with regard to the AIDS Commission.

-- An advisory committee must publish at least 15 days before a committee meeting a notice in the Federal Register which includes the name of the committee; the time, date, place and purpose for the meeting; a summary of the agenda; and a statement on whether the meeting is open or closed to the public -- if closed, the specific reasons also should be published. In exceptional circumstances, fewer than 15 days notice of a committee meeting may be given, but the reasons for a abbreviated notice period must be included in the published notice. We found that the AIDS Commission did publish notices of planned meetings in the Federal Register. For one meeting, the notice was published 8 days in advance with an explanation that the Commission needed the views of members of Congress as soon as possible. For another meeting, the notice was published 14 days in advance with no explanation. For the other four meetings, notices were published more than 15 days in advance as required by the regulations. In two cases, the meeting notices did not indicate whether the meetings were open or closed as the regulations require.

- In order to close a meeting to the public, an advisory committee must submit a request to the agency head in sufficient time before publishing the meeting notice to allow a full review, including one by legal counsel, of the justification for closure. If the agency head approves the request, he or she must issue a determination that all or part of the meeting may be closed and cite the specific reasons for such closure. We found that the Commission followed the required procedures, and the Secretary of HHS approved its request for the one closed meeting.

The Commission is responsible for maintaining personnel records for its staff. However, many of these records were incomplete. For example, we found no documentation to show that staff appointments had been approved.

AIDS Commission Chronology

You asked that we examine the Commission's activities and develop a chronology of events. The AIDS Commission has been the subject of considerable controversy since it began. As explained to us by GSA officials, the Commission is an atypical committee because of its political nature and the sensitivity of the subject matter it covers. A chronology, as best we could determine it, follows.

On July 23, 1987, the President announced the formation of the AIDS Commission and named the members he intended to appoint in a statement issued by his Assistant for Press Relations. The Commission members chosen by the President met that day with the President, Secretary of Health and Human Services, Director of the National Institutes of Health, and Director of the National Institutes of Allergy and Infectious Diseases and other leaders in the health community. Also, on July 23, 1987, the Chairman appointed an acting executive director.

After the gathering on July 23, 1987, the Chairman and acting executive director began to establish the Commission's Washington office and plan the Commission's future activities. From late July until early September numerous actions were taken to get the Commission underway including (1) obtaining the facilities, office equipment and furniture, and supplies needed to support the Commission, (2) contracting with a private firm for the planning and support of the Commission's meetings, (3) hiring the acting executive director as permanent executive director on August 26, 1987, (4) hiring two professional and two administrative staff members on August 31, 1987, (5) planning visits to New York City and San Francisco, the two areas most affected by AIDS, so Commission members could gain further information on AIDS issues, (6) planning and arranging the agenda for Commission meetings, and (7) preparing a questionnaire for obtaining members' views on the issues they believed should be addressed by the Commission.

During the first few days of September, before the Commission's members were officially sworn in, some members visited New York City and San Francisco. Contractor records showed members Dr. William Walsh, Dr. Burton Lee, John Cardinal O'Connor, Richard DeVos, Dr. Colleen Conway-Welch, John J. Creedon, Dr. Frank Lilly, and Chairman Dr. Eugene Mayberry participated in the New York City visit. Included on the itinerary was a presentation by the Sloan-Kettering Department of Infectious Diseases and visits with people with AIDS and institutions providing care for people with AIDS. Members Dr. Woodrow Myers, Dr. Cory SerVaas, and Chairman Mayberry participated in the San Francisco visit. They visited the San Francisco Health Department, the San Francisco AIDS Foundation, the Coming Home Hospice, and San Francisco General Hospital.

The next gathering of the Commission took place in Washington, D.C. on September 8, 9, and 10, 1987. On the evening of September 8, 1987, the day before the Commission members were officially sworn in, the members attended a gathering. Several members we interviewed described this gathering as a social event, not an official Commission meeting. According to some Commission members present, several members conversing at the gathering expressed the view that the Commission was not moving fast enough and needed to develop an action plan for accomplishing its assigned functions.

On September 9 and 10, 1987, the Commission held a public meeting. This meeting was devoted to obtaining information on the government's role in combating the AIDS epidemic and selected interest groups' views on AIDS issues. The Chairman distributed a questionnaire to Commission members soliciting their views on the issues before the Commission. Six Commission members returned the questionnaire.

Some of the members' questionnaire responses criticized the Chairman's management style. One member said that the Commission was being run like a corporation with all decisions being made at the top and filtering down; he believed that all Commission matters of importance should have been discussed and voted on by the full Commission. One Commission member commented that better communication between the Chairman, Vice Chairman, and members was needed and that the most significant issue facing the Commission was the selection of another executive director and a public affairs officer. (The executive director had resigned on September 11, 1987.) This member also suggested that members should become more involved in planning and agenda development to assist the Chairman in fulfilling the Commission's mission.

On September 30, 1987, the Commission held a public meeting in Washington, D.C. to gather information from members of Congress on the status of legislation on AIDS issues. The week after this meeting, on October 7, 1987, the Chairman and Vice Chairman resigned. According to an associate of the former Chairman who worked with him on Commission matters, the former Chairman had grown frustrated with some members' persistent criticism of Commission operations. Because the former Chairman declined to be interviewed, we were unable to obtain a first hand account of the events that led up to his resignation. The former Vice Chairman resigned as a result of Dr. Mayberry's resignation and a feeling that he could no longer serve the Commission. The current Chairman was appointed on October 7, 1987, and the current executive director was appointed on October 16, 1987.

Department of Health and Human Services Support to the AIDS Commission

The executive order establishing the Commission required the Office of the Secretary to provide the Commission with any administrative services, funds, facilities, staff, and other support needed by the Commission to accomplish its functions.

The current Commission Chairman, current executive director, and former Vice-Chairmen rate highly the support services provided the Commission by HHS.

In all interviews with Commission members and staff, we were told of only one instance where a Commission request for support was not accommodated. The former executive director told us that she had made an informal arrangement with the supervisor of Public Health Service employee for the employee to be detailed to the Commission. The former executive director told us that this arrangement was not approved by HHS. The Assistant Secretary for Health told us that he had no knowledge of why the employee was not detailed and that his policy was to provide any support service requested by the Commission.

This concludes my statement, Mr. Chairman. We will be glad to answer any question you or other members may have.

GSA'S ANSWERS TO QUESTIONS FROM SENATOR ROTH

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: In testimony submitted for the record, Philip Harter charges that the process of creating an advisory committee is too cumbersome and, further, that agencies should not have to go through GSA to establish an advisory commission. I have several questions on GSA's role:

A. As a practical matter, does GSA really grant "permission" to an agency to establish an advisory committee; put another way, does GSA have the authority to reject the establishment of advisory committees proposed by the agencies to be established?

B. GSA's principal role in creation is one of consultation. What does GSA do in that process; for example, does it inquire of the proposing agency whether it has determined that the functions to be performed by the proposed advisory committee could not be performed by an existing committee?

C. What exactly has GSA done to streamline the consultation process?

D. What role does GSA play in assisting a new advisory committee - whether agency created or Presidentially created - to get that committee going in terms of office space, furnishings and equipment, and guidance on compliance with the FACA?

E. Is there, by the way, any handbook for advisory committees on how to get started and how to conduct their operations consistent with the FACA; or is such guidance to be provided by the parent agency?

ANSWER: The Federal Advisory Committee Act provides for consultation between GSA and Federal departments and agencies relative to the establishment of advisory committees. The Act, however, does not define the process to be used in fulfilling this responsibility. Accordingly, FACA does not provide GSA with the authority to "veto" an agency's proposal to establish an advisory committee.

ANSWER: (Continued)

GSA has configured the consultation process as follows:

1. At any point up to and including a formal determination by an agency head that an advisory committee is necessary and in the public interest, GSA works closely with the agency's Committee Management Officer (CMO) to review the proposal for consistency with the provisions of FACA.

2. When a formal proposal for establishing an advisory committee is received by GSA, the Committee Management Secretariat evaluates the Charter for consistency with FACA, and other applicable laws and regulations, and requests comments from the Office of Management and Budget (OMB) and other agencies, if appropriate, to identify instances of possible duplication of effort. GSA also consults its own records for any relevant background materials.

3. Any problems identified during the consultation process are resolved between GSA and the CMO, thus completing the process.

   GSA has not maintained statistics covering the average amount of time required to complete the consultation process required by section 9(a). However, a review of all consultations completed during fiscal year 1987 reveals that, on average, consultations between GSA and Federal agencies took 12.6 calendar days. GSA is sensitive to the need to process consultations expeditiously and has established an internal goal of 10 calendar days to complete such actions. Changes reflected in GSA's Final Rule on Federal advisory committee management and the acquisition of an internal computer support system will assist in achieving this goal.

GSA's Final Rule on Federal advisory committee management provides that agencies proposing advisory committees review their existing groups for instances of possible duplication of effort. The Rule provides that GSA will review proposals for possible duplication between agencies.

ANSWER: (Continued)

The General Services Administration (GSA) provides a broad range of administrative support to independent Presidential advisory committees on request. When such assistance is requested, it normally consists of payroll processing, accounting, budgeting, personnel, legal, security investigations, and other general office support.

Responsibility for providing for the operations of all other committees, including those created under general agency authority, is assigned to the sponsoring organization, unless otherwise provided for by statute or Executive Order.

At the current time, there is no single handbook which may be used by all Federal advisory committees in arranging their affairs. While sponsoring organizations are responsible for providing this type of assistance, GSA recognizes that additional efforts are necessary to assure that committees receive adequate guidance. GSA's Interagency Committee on Federal Advisory Committee Management, composed of Federal Committee Management Officers, will be asked to address this requirement in the near future.

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: A large percentage of advisory committees are authorized or directed by congressional action. Such committees are to terminate after 2 years unless their duration is otherwise provided by law.

A. In the annual report, how do you account for congressionally created advisory committees whose duration is not specified in the authorizing legislation after they have been in existence for 2 years?

B. Does FACA give sufficient guidance and authority to the agencies on when and what basis to terminate advisory committees?

ANSWER: The Annual Report of the President on Federal Advisory Committees does not provide specific data discriminating between congressionally directed committees having no fixed duration and similar committees which operated under the terms of FACA's 2 year sunset provision. Statistical information on all types of committees, which includes the establishment authority, is summarized as provided by the Act.

Other information provided to the Congress as part of GSA's responsibility to conduct an annual comprehensive review of all committees provides more detail on a given group's longevity. This information, which is directed to the Senate Committee on Governmental Affairs and the House Committee on Government Operations, may be used by the Congress as part of the oversight function envisioned by FACA.

In GSA's opinion, FACA provides sufficient policy guidance on when and how advisory committees should be terminated. However, the task of terminating many committees is complicated by the need to pursue such actions through legislation. GSA has suggested that Congress consider amendments to FACA which would allow termination of statutory committees through administrative action, with appropriate congressional oversight.

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: Regarding the GSA annual report, besides aggregate numbers, does the report give us any evidence as to the relative quality of the management of advisory committees from one agency to another, for example, the proclivity toward closed meetings, costs versus benefits of committees, and whether the agencies are diligent in terminating advisory committees that have fulfilled their purpose?

ANSWER: The Annual Report of the President on Federal Advisory Committees provides a wide range of information relating to the Governmentwide management of Federal advisory committees, including those areas mentioned in your question. The report is transmitted to the Congress in two parts. First, Congress is provided with information on advisory committees at the Governmentwide and agency summary levels. This information is transmitted by the President to the Congress.

Second, GSA provides detailed information on the management of each committee in existence during the fiscal year directly to the Senate and House following transmittal of the President's report. This information is collected pursuant to the Act's requirement for an annual comprehensive review of all committees. This review is designed to provide a basis for evaluating committee activities and the overall performance of Federal departments and agencies in complying with the Act.

Combined, these two elements provide a basis for evaluating individual committee and agency performance in complying with FACA.

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: Mr. Glitzenstein stated in his testimony that the high profile "Blue Ribbon" committees highlight the role that FACA plays. But, don't the many lesser-known committees highlight a different problem; that being assuring the accountability of such committees and terminating them when they are no longer needed?

A. Do the agencies do a good job of weeding out their own committees?

B. Does GSA have enough clout to force such scrutiny in the agencies?

ANSWER: The relative obscurity of many Federal advisory committees does not, in and of itself, pose substantial impediments to their timely termination. One of the most important factors in assuring that unneeded committees are terminated lies in the development and implementation of effective management controls. The Federal Advisory Committee Act provides for the maintenance of such controls.

The relative stability in the total numbers of committees, combined with relatively modest growth in the resources they consume, indicates that past and current efforts to exercise management control have been effective. This does not mean, however, that more cannot be done to enhance the implementation of the Act's intent.

While GSA is committed to controlling the growth and costs associated with committee activities, it also has taken actions to assure that the Government receives maximum benefits for each group created. For example, GSA recently established an Interagency Committee on Federal Advisory Committee Management to provide for a forum to identify and resolve problems relating to compliance with the Act. This group, composed of Committee Management Officers from major departments and agencies, will be involved in efforts to provide Governmentwide training on FACA; devise a desk guide for use by committee staffs in solving problems; provide for improved reporting; and enhance communications.

ANSWER: (Continued)

In GSA's view, the Committee Management Secretariat has sufficient access to the resources required to assure compliance with FACA. The Secretariat interacts with departments and agencies at senior levels and, as required, has the ability to address management issues with other entities, such as the Office of Management and Budget and the President's Council on Management Improvement.

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: Some questions have been raised about so-called "operational" committees. Some examples of such committees are the Commission on the Bicentennial of the Constitution, the Holocaust Commission, and the Commission on Fine Arts.

A. Aren't these really separate agencies with operational responsibilities, rather than advisory committees, and, if so, is there a need to clarify this point in the FACA?

B. Advisory committees which consider grant applications and make recommendations to the agency on those applications are advisory, not operational, committees, is that correct?

ANSWER: The common use of the terms "committee" and "commission" creates some confusion, particularly on the part of the public, regarding the applicability of the Federal Advisory Committee Act to the operations of many groups. However, with regard to operational committees, such as those cited above, GSA does not believe that amendments to the Act would be effective in enhancing the distinctions between operational and advisory committees.

Operational committees, or groups, are normally created by an Act of Congress to perform a specific function. They share many of the attributes of an agency in that they are normally provided with a budget, have the ability to hire staff and enter into other contractual arrangements, and, in some cases, to obtain resources from the private sector.

The Act's definition of an "advisory committee" is quite broad. In testimony before the Senate, GSA has suggested that Congress consider more precise language. However, as currently worded, the Act is sufficient to provide the basis for determining whether a committee is "operational" or "advisory."

Committees which consider grant applications are advisory only.

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The Federal Advisory Committee Act

QUESTION: Regarding the balanced membership requirement, it seems to me that balance on a particular advisory committee is going to turn upon the functions to be performed by the particular committee. Accordingly, it seems to me that the Act's requirement that the committee be fairly balanced in terms of points of view represented and functions to be performed provides as much guidance as possible given the infinite variety of functions that particular advisory committees might be called upon to carry out. Could you comment on that?

ANSWER: We agree that the balance of a particular committee's membership is intrinsically linked with the group's mission. Accordingly, selection of members is by necessity based upon the expertise required by the sponsoring organization.

In our testimony before the Committee, we have suggested that Congress consider amending the Act to clarify when the balance provision applies to the creation of advisory groups. The Act is clear in its provision that advisory committees be balanced when they are created by statute. The Act is less clear, however, with regard to committees created by departments and agencies and the President.

As a practical matter, it would be quite difficult to develop a workable definition of "balance." Accordingly, in GSA's view the final determination of when adequate balance has been achieved should remain with the establishing authority.

STATEMENT OF ERIC R. GLITZENSTEIN,
PUBLIC CITIZEN LITIGATION GROUP

December 3, 1987

Before the Committee on Governmental Affairs
of the United States Senate

I thank the Committee for this opportunity to testify about the Federal Advisory Committee Act, 5 U.S.C. App. I ("FACA"). FACA is an extremely important "open government" statute, yet it receives little public scrutiny, especially compared with other open government laws such as the Freedom of Information Act and the Sunshine Act. One of the reasons for this lack of attention is that, although the government utilizes thousands of advisory committees every year, most of these committees have extremely narrow functions and they operate largely in obscurity. Committees such as the Santa Monica Mountains National Recreation Area Advisory Commission, the Visual Arts Advisory Panel, the Rules of the Road Advisory Council, and the Merit Review Board for Gastroenterology Programs, to name just a few, are unlikely to generate widespread public interest in the operation of FACA, or to spawn major litigation regarding Congress' intent in enacting the statute.

Not surprisingly, FACA does become the object of public attention, as well as the subject of litigation, when the President or Congress creates a committee, generally with a great deal of fanfare, to assist in addressing a major, controversial question of public policy. In the last several years alone, there have been a number of such committees, focusing on issues such as acid rain, the social security system, South Africa, pornography, the MX missIle, the Strategic Defense Initiative, cutting of costs throughout the federal government (otherwise known as the Grace Commission), and privatization of federal functions. One of the most controversial committees is the one established by the President to render advice on the AIDS epidemic, officially known as the Presidential Commission on the Human Immunodeficiency Virus Epidemic.

Because of their obvious importance to the public and to federal officials, these "blue-ribbon" committees highlight the role that FACA plays in the federal establishment, as well as the deficiencies and drawbacks in the statute as it is currently drafted. On the other hand, because they deal, by definition, with politically volatile subjects, there is a risk that any analysis of them will become bogged down in their subject matter, and lose sight of the underlying questions about FACA and how well it is working. In the testimony that follows, I will attempt to avoid that risk by walking a fine line -- that is, I will use advisory bodies such as the AIDS Commission and the Grace Commission to illustrate how FACA currently functions (and particularly the problems that exist with the law as it is written and as it has been interpreted by the courts) but I will strive to steer clear of the actual work performed by those committees, as well as the validity of the recommendations they have issued.

Fifteen years of experience with FACA has taught us that, while the statute has worked fairly well overall, there a number of areas where legislative tightening and clarification is essential. I will address each of those areas in turn.

1. Balanced Representation

Of all the provisions of FACA, section 5(b), which requires that the membership of advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed," and also that committees not be "inappropriately influenced by the appointing authority or by any special interest," is most in need of legislative scrutiny. "Balanced representation" is an inherently amorphous, ambiguous concept which lends itself to a myriad of possible interpretations and applications. Everyone agrees, at least in theory, that advisory committees are irrelevant or worse unless they have adequate expertise to study the problems to which they have been assigned, as well as a reasonable cross-section of viewpoints. But applying these concepts to particular committees, especially those that are created to tackle highly controversial and politically divisive questions, is extremely difficult. Accordingly, the more explicit the guidance, and the clearer the standards coming from Congress, the easier it will be for federal officials -- and federal judges -- to apply the balanced representation requirement.

With the foregoing in mind, there are several specific ways in which FACA's balanced representation provision can be improved. First of all, it would be useful for Congress to clarify that the balanced representation requirement is fully applicable to all committees created by the President, agency heads, and other Federal officials. While the D.C. Circuit, in its ruling on the Grace Commission (see National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071 (1983)), found that the balanced representation provision does apply to advisory committees established by the President and other federal officials, the statute is far from clear on this point and invites further, unnecessary litigation.

Second, in the Grace Commission case and, more recently, in litigation involving the AIDS Commission, the government has suggested that Congress did not intend to create a private right of action to enforce the balanced representation requirement and, similarly, that no one has standing to raise a balanced representation claim, even when they may be vitally affected by the work of a particular committee. While the D.C. Circuit also expressed disapproval for these arguments in the Grace Commission case, it is clear that they will continue to be made and will complicate efforts at enforcement of the statute in the absence of legislative clarification. Accordingly, Congress should make clear that persons who may be affected by the work of a committee may sue to enforce the balanced representation requirement, just as members of the public may sue over violations of the statute's open meeting and document production provisions.

Third, with respect to the substantive standards for balanced representation, two points should be made explicit in the statute. One is that an advisory committee cannot be balanced unless it includes representatives of groups that may be directly affected by its work. In the Grace Commission case, Judge Gerhard Gesell reasoned that an advisory committee that was preparing recommendations on ways to cut back on food stamp and other federal food programs could not be balanced in the absence of any representatives of persons who are dependent on the programs and could therefore be harmed by the recommendations being considered. Following Judge Gesell's ruling, however, the Reagan Administration has continued to establish committees that lack any representation of affected groups. For example, in 1986, the Department of Labor established a task force to study important pension plan issues, but the task force had virtually no representation of workers, retirees, or dependents of retirees -- the persons who would be most directly affected by the work of the task force.

Perhaps the most extreme example of a committee that has lacked representation of affected groups is the AIDS commission, which is charged with the extraordinarily broad function of preparing recommendations on virtually every aspect of the AIDS epidemic. As originally constituted, the Commission had virtually no representatives of people with AIDS, health care workers who have delivered services to such persons, or the population groups that have been hardest hit by the disease. Such a lack of representation is not only grossly unfair, but it will inevitably undermine the work of a commission that depends on obtaining information from persons and groups who are most familiar with the epidemic and its devastating effects. Moreover, it is obvious that recommendations on vital issues, such as public education measures, are much more likely to be accepted by affected groups if they have some representation on the commission.

While FACA's original legislative history suggests that Congress was very concerned about representation by affected groups, the statute makes no specific mention of such groups and thus leaves the door open to efforts to exclude them from important advisory bodies. Accordingly, it would be extremely valuable to both the public and the courts for Congress to amend Section 5(b) to state explicitly that advisory committees must have representatives of groups that may be directly affected by their work.

The other aspect of balanced representation that needs to be made explicit in Section 5(b) concerns the need to ensure that committees have sufficient expertise. Obviously, an advisory committee cannot effectively perform the functions it is assigned unless it has members who actually have a background in, and understanding of, the issues that will be considered. In addition, it is unfortunate but true that advisory committees are occasionally established _not_ to render informed, objective advice on a particular subject but, rather, to merely rubber-stamp the views of the officials who established them or, just as bad, to create the appearance of action on an issue when nothing is really being done. In such circumstances, the chartering of an advisory committee under FACA can be used to fool the public into believing that an "expert commission" is scrutinizing a particular problem, or endorsing a specific solution to the problem, when the reality is far different.

In addition to lacking representation by affected groups, the AIDS Commission also illustrates the problems associated with not having sufficient expertise on advisory committees. Despite the fact that there are hundreds of recognized AIDS experts on the medical, legal, and sociological implications of the epidemic, the Commission, at least as originally constituted, was virtually bankrupt of this collective body of expertise. Tellingly, S. 63, a bill introduced into the Senate for the purpose of creating a National Commission on AIDS, recognized the need for expertise by specifying that members must include "representatives of academic institutions which conduct research" on AIDS, as well as "representatives of public and nonprofit private organizations involved in activities relating to" AIDS. Unfortunately, the White House ignored any such sensible approach in choosing the members of the AIDS Commission, and instead selected several persons whose publicly-stated views on the disease have been labeled "dangerously uninformed" by experts. It is little wonder that the Commission has, for most of its brief existence, been unable to carry out the mission assigned to it -- a mission that would surely be daunting to even a commission composed of members with solid backgrounds in the issues under study.

Unless FACA is amended, these kinds of problems will continue to confront future advisory bodies. Section 5(b) of the statute should, therefore, expressly provide that all advisory committees must have sufficient expertise to carry out the functions they are assigned. This does not mean, of course, that every member of an advisory committee must be a recognized expert in the issues under scrutiny, but at least some of the members of committees must be familiar with, and able to explain, the body of information and expertise that has accumulated on the issues. Without such a requirement, advisory committees can more easily be used as rubber stamps and vehicles of delay, and not as the "expert commissions" that Congress and the public rightfully expect them to be.

Fourth, the balanced representation issue cannot be resolved without considering the related question of potential "conflicts of interest" of committee members. It is clear that, in enacting FACA, Congress was concerned that advisory committees not be dominated by parties whose private interests could influence their recommendations, and the balanced representation provision was designed, in part, to avoid that problem. However, there currently exists no effective way for the public to ensure that committees are not in fact controlled by persons who may have a direct economic interest in their work. Indeed, advisory committee members may have significant economic interests that are not disclosed to the public or even to the federal officials to whom they report. As explained by a Common Cause study, "[t]he patchwork financial disclosure system that currently exists for advisory committees is uneven and ineffective." Public Advisers/Private Interests 44 (February 1984).

One recent example involves an effort by the Natural Resources Defense Council to obtain financial information about members of the Environmental Protection Agency's Science Advisory Board. Despite newspaper reports that members of the Board have stock holdings in companies that manufacture pesticides reviewed by the Board, EPA has refused to release any such information to the NRDC or other members of the public. In order to resolve this problem, Congress should adopt a uniform requirement that all members of advisory committees must fill out forms, which are made available to the public, specifying their economic and other interests in the work of the committees. Without such a requirement, the public and Congress will be unable to discern whether advisory committees are being controlled by narrow economic interests.

Finally, as the foregoing discussion on conflicts of interests suggests, Congress could avoid many balanced representation problems by simply requiring greater public participation in the process of selecting advisory committee members. For example, agencies responsible for chartering committees could notify the public about the functions to be performed by committees being contemplated, and invite the public to offer suggestions regarding interests that should be represented and specific persons who might be appropriate members. Obviously, agencies would not be bound by these suggestions, but they would be in a much better position to resolve potential balance problems for two related reasons -- first, such a procedure would force agencies to analyze, at an early stage, the precise functions to be performed by committees (and thus the various kinds of interests that are relevant to those functions), and, second, agencies would be able to evaluate, early on, what concerns members of the public may have regarding the composition of a committee, and whether those concerns could reasonably be met. A notice and comment procedure could, therefore, be invaluable not only to the public, but also to all federal officials who use advisory committees.

2. Coverage of the Statute

The other basic issue that warrants Congressional scrutiny involves the threshold coverage of the law -- which kinds of advisory processes are covered and which are not. Even though the statute is currently defined in extremely broad terms, courts have had difficulties determining whether specific arrangements were intended by Congress to comply with the law's various requirements.

The most significant loophole which has been created by the courts concerns committees' use of subgroups or subcommittees. Obviously, if a committee delegates most or all of its work to a subgroup which does not comply with FACA's openness and balance requirements, then the whole point of the law is defeated. In the Grace Commission case, for example, an executive committee was chartered under FACA, and it held most of its meetings in public. However, virtually all of the work actually done by the Commission, including the drafting of recommendations on ways to cut costs throughout the entire federal establishment, was performed by thirty "task forces" consisting of members of the executive committee and other persons. Those task forces made no effort to comply with FACA's openness or other requirements. In essence, the only thing that the public had an opportunity to see was the executive committee's essentially pro forma ratification of the task forces' final reports.

Unfortunately, Judge Gerhard Gesell accepted the government's argument that the task forces were not covered by FACA. In so doing, he adopted an extremely formalistic construction of section 3(2), which can easily be exploited to circumvent Congress' intent in creating the law. Thus, Judge Gesell held that subcommittees or subgroups are not covered by FACA at all unless they make recommendations directly to the President or other federal officials. If, on the other hand, they report to their parent committee, which then passes along their recommendations to federal officials, they are essentially free to ignore the statute's requirements, including the requirement for balanced representation. This hypertechnical approach clearly undermines the purpose of the law and should be corrected through a clarifying amendment.

The other major issue that has arisen regarding FACA's threshold coverage involves the definition of committees that are informally "utilized" by federal officials, in contrast to those that are officially "established" by charter. Contrary to some suggestions, the distinguishing factor has nothing to do with whether an advisory body conducts only one meeting, as the General Services Administration has recognized in its interim and proposed final rules implementing FACA. It is obvious that even a quintessential advisory committee -- with fixed membership, a precise function, and a mandate to issue specific recommendations to federal officials -- may meet only once. For example, the AIDS Commission could have had staff members conduct research for a year and then had one meeting to adopt recommendations based on that research. The notion that it would not be an advisory committee merely because it would be giving the public only one opportunity to see it deliberate and arrive at its recommendations makes no sense.

Rather, whether a particular advisory process is covered by FACA must turn on whether it is actually functioning, in the words of the statute, as a "committee, board, commission, council, conference, panel, task force, or other similar group," i.e., whether it is being asked to develop consensus advice or recommendations on a particular subject of concern to federal decisionmakers. This is essentially the definition adopted by Judge Gesell in an early FACA case, Nader v. Baroody, in the course of deciding that certain ad hoc gatherings between White House officials and an ever-changing cast of private individuals were not subject to the statute. Under this approach, some kinds of entities are clearly being utilized as advisory committees by federal officials, although they have never complied with any of FACA's requirements.

For example, the American Bar Association's Standing Committee on the Federal Judiciary is routinely used by the Department of Justice for the provision of advice and recommendations on potential nominees to the federal bench and, as recent events involving Judges Bork and Ginsburg make clear, the ABA's recommendations often play a vital role in the judicial selection process. Even so, because the ABA Committee has never been chartered under FACA, there is great confusion as to the precise function that is being, and should be, performed by the Committee. At the Bork hearings, for instance, senators on both sides of the aisle, as well as the Chairman of the ABA Committee, confessed uncertainty as to the exact role that a nominee's ideology does and should play in the ABA's advisory process. Even so, the Justice Department has steadfastly refused to take the minimal step of chartering the ABA Committee under FACA, and is now arguing adamantly in court that the Act should not be construed to cover what is a classic advisory committee.

On the other end of the spectrum, it is clear that where federal officials simply gather a number of individuals together, and do not direct them to develop consensus advice on a particular issue or topic, then an advisory "committee" does not exist. For example, under common sense interpretations of FACA, the Secretary of State would be able to meet with his predecessors to have a general discussion about international affairs, without preparing an advisory committee charter. In any event, it would be helpful for Congress to clarify, perhaps in a report, the kinds of arrangements that are intended to be covered by the statute. Of particular importance, Congress should stress that the test turns not on how many meetings are being held, or on any other arbitrary set of criteria, but rather, on a functional examination of whether a particular entity is actually being utilized as an advisory committee, _i.e._, whether it is being asked to develop recommendations on a particular matter of concern to federal officials.

3. Public Access Requirements

Section 10 of FACA establishes the general rule of public access to committee meetings and documents. Unfortunately, it has frequently been the case, especially when major, controversial committees are established, that the public access objectives of the Act have not been realized. The AIDS Commission provides a textbook illustration of how the public access requirements of the Act can all too easily fall through the bureaucratic cracks. Although section 8 of FACA requires the designation of Advisory Committee Management Officers who are responsible for ensuring compliance with the other provisions of the law, there has been extraordinary confusion over whether there is such an officer who is responsible for the AIDS Commission. Thus, the Department of Health and Human Services, which prepared and published the Commission's charter, suggested that the White House is responsible for designating such an officer because the Commission was established by Executive Order. Simultaneously, officials in the White House were pointing their fingers at HHS. Ultimately, everyone seemed to agree on who the designated official was, but, unfortunately, the person they agreed on was a member of the Commission's own staff -- and thus hardly in a position to "exercise control and supervision" over the Commission's compliance with the law, as required by Section 8 of the statute.

This Keystone Cops routine might have been humorous if it had not had such a deleterious impact on the public's ability to obtain vital information about the Commission's work. Months after the Commission was created, it had still not placed its documents in a "single location" where the public could review them, as required in section 10(b), and concerned groups and individuals have found it virtually impossible to track down specific materials being reviewed by commissioners. Similarly, the Commission's notification to the public about when meetings are being held, whether and why they are to be closed, and the subject matters to be discussed by commissioners, has been seriously deficient. While these problems may not undermine the Commission's work as much as a lack of balance in membership, they are far from cosmetic. If the public loses confidence in its ability to monitor the Commission's work, then it will lose confidence in the entire Commission. Particularly since the success of the Commission is dependent on its attaining credibility with particular population groups, its failure to comply scrupulously with the open meeting and document access provisions of the statute does not bode well for the Commission's future.

In order to ensure that similar problems do not beset other advisory bodies, there are several small but significant steps that Congress could take. First, it could clarify that when an agency charters a committee, its Advisory Committee Management Officer is always responsible for supervising the committee's compliance with FACA, even if the committee was initially created by executive order. Second, Congress should make it clear that this officer cannot also serve as a member of the committee's staff -- an individual cannot effectively "control and supervise" an advisory committee, while at the same time be under the control and supervision of the members of the committee. Third, it would be very helpful if each agency were required to publish in the Federal Register, at the earliest opportunity, the name of the federal official who is responsible for overseeing compliance with FACA. Advising the public which federal official is accountable when problems of access to meetings or documents arise will greatly facilitate resolution of those problems.

Another legislative change that could help the public and also assist in the smooth functioning of advisory committees involves access to documents after committees have ceased to function. Public interest in committees is sometimes kindled after committees have completed their work and issued final reports; the public should not be deprived of documents regarding a committee at a time when there may be intense interest in the work of the committee, i.e., in the period following release of the committee's report. At the same time, it may be less disruptive to agencies and committees if members of the public refrain from seeking documents until the committee has terminated its work. Ensuring public access for a fixed period following the termination of committees should, therefore, reduce the burden on agencies by reducing the public's need to pursue documents while committees are still deliberating and formulating recommendations. Accordingly, I suggest amending Section 10(b) to require that all agencies chartering committees maintain in a single location the documents of those committees for at least one year following the completion of the committees' work.

Of course, providing for access to committee records following the termination of committees will not totally eliminate the public's need for such materials while committees are in existence. Accordingly, the Act must also ensure that members of the public who wish to closely monitor the work of committees are not precluded from doing so because of the application of FOIA Exemption 5's deliberative process privilege to advisory committee records. For example, in a recent case concerning the Pornography Commission, which has since issued its final report, the Justice Department withheld from the public all of the Commission's drafts and working papers. That, in turn, prevented the public from effectively following what was being discussed at the Commission's meetings. After a lawsuit was filed, the Justice Department agreed to the release of these documents, which turned out to be crucial to the ability of public organizations and individuals to understand and effectively critique the Pornography Commission's far-ranging recommendations. While the Justice Department now apparently agrees that the deliberative process privilege cannot be used to withhold advisory committee, it has never responded to several requests by Public Citizen that it send guidance to other agencies regarding this issue. Accordingly, it would be helpful to agencies and the public if Congress were to clarify that advisory committee materials can never be withheld from the public under the deliberative process component of FOIA Exemption 5.

4. Attorneys' Fees

The final major gap in FACA involves the right of members of the public to obtain attorneys' fees after successfully enforcing the requirements of the statute in court. With the exception of FACA, each of the major "open government" laws -- FOIA, the Sunshine Act, and the Privacy Act -- contains a specific attorneys' fees provision authorizing plaintiffs who substantially prevail to recover attorneys' fees. This absence of a fee provision does not necessarily preclude the recovery of attorneys' fees because of the Equal Access to Justice Act's catch-all provision for attorneys' fees in lawsuits against the federal government. However, the standard for recovery under EAJA is much higher than under the FOIA or the Sunshine Act -- parties must not only "prevail," they must also demonstrate that the government's position is "substantially unjustified" -- while the recoverable hourly rates are significantly lower -- a ceiling of $ 75 an hour compared with market rates under the attorneys' fees provisions in open government laws. There is no rational reason why plaintiffs prevailing in the FACA context should not be subject to the same rules and rates for attorneys' fees as plaintiffs who succeed under analogous statutes. Indeed, without the prospect of recovering reasonable attorneys' fees, members of the public may not be able to sue to redress even egregious violations of the statute. Accordingly, Congress should adopt an attorneys' fees provision which authorizes the award of fees and costs to plaintiffs who "substantially prevail" by proving a violation of any requirement of the statute.

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Over ten years of experience with FACA has shown that it can be a valuable statute. If advisory committees are open, accountable, and fair, then virtually everyone benefits -- the public, which pays for and may be vitally affected by the work of committees; the President, members of Congress, and other federal officials, who rely on the recommendations of advisory bodies; and, of course, the members of committees themselves, who are willing to give of their time and expertise, and want to see that their hard work is of benefit to someone. If, on the other hand, advisory committees are permitted to function in a biased and secretive way, as too frequently has been the case, then the advisory committee process can become hazardous to the health of a democracy -- not a means of educating the public and its officials about a problem but, rather, a device for defrauding the public into believing that a problem is being solved when it is not or, just as dangerous, into believing that neutral, expert advice is being developed when in reality the advice is predetermined by a stacked membership.

This is an opportune occasion to strengthen FACA to ensure that its lofty objectives are fulfilled when committees are created in the future to assist in solving the full range of problems that arise in our society. I urge Congress to meet that opportunity head-on by taking a law that has worked reasonably well on occasion and, through relatively minor amendments, transforming it into a statutory scheme that can function extremely well all of the time.

Robert F. Murray Jr., M.D.

Mr. Chairman and Members of the Committee:

I am Robert F. Murray Jr., a member of the faculty of Howard University College of Medicine where since 1968 I have been Chief of the Division of Medical Genetics , Department of Pediatrics and Child Health and Professor of Pediatrics, Medicine and Oncology. Since 1974 I have been Chairman of the Department of Genetics and Human Genetics in the Graduate School of Arts and Sciences of Howard University. The views in this testimony are mine and do not represent those of Howard University.

I am a 1958 graduate of the University of Rochester School of Medicine and am an Internist certified by the American Board of Internal Medicine. I am also trained in and Board eligible in Medical Genetics.

I am a member of the Institute of Medicine (IOM) of the National Academy of Sciences (NAS), A Fellow of the American Association for the Advancement of Science, and a Fellow and Member of the Board of Directors of the Hastings Center, Briarcliff Manor, New York.

I have had many years of experience and service on many study panels, committees and advisory commissions begining in 1971 and continuing until the present including :

1. Chairman, Commitee on the Study of Sickle Cell Trait in the Armed Forces, National Research Council, NAS, 1972.
2. Member, Scientific Advisory Board, National Sickle Cell Anemia Foundation, Inc., 1972-present.
3. Member, Committee on Testing for Cystic Fibrosis, National Research Council, NAS, 1974-75.
4. Member, National Advisory General Medical Sciences Council, NIGMS, NIH, 1971-1975.

5. Member, Bioethics Advisory Board to the Secretary of (then) DHEW, 1977-1980.

6. Chairman, Committee to Study the Scientific Evidence Relevant to the Mandatory Retirement of Airline Pilots at 55 Years of Age. IOM, NAS, 1980-81.

7. Member of Committee to Study the Medical Effects of Marijuana. IOM, NAS, 1981-1982.

8. Chairman, Mayor's Advisory Committee on Metabolic Disorders. District of Columbis, 1980-present.

9. Member, Expert Advisory Panel on Genetic Testing in the Workplace. Office of Technology Assessment, U.S. Congress, 1982-1983.

10. Member, Task Force on AIDS/Panel on Research, IOM, NAS, 1986-1987.

I have also served on a number of other panels and committees concerned with a variety of medical and scientific topics. Because I have had this breadth of experience working on and chairing committees and panels I have learned something about the process of selecting committee members who will be able to meet the objectives and goals for which the committee has been created.

In the best of all possible worlds a study committee or panel would be created of intelligent individuals who have a detailed knowledge of all the aspects of the topics being studied and who also are totally neutral in their point of view and have no particular bias in the decisions that are reached or the recommendations that are made. But since completely unbiased, socially and politically neutral individuals don't exist the members of the committee have to be chosen so that their opinions and positions on the issue being studied are reasonably representative of the ideas and opinions that might be considered.

The concept that has been adopted in constituting these study bodies is that they should be "balanced" relative to points of view. Unfortunately, this approach can be disastrous for a panel if the balance is achieved by having people with totally opposite points of view on the study group. This would establish a climate in which it would be impossible to achieve concensus on any points of view or recommendations to be made to the constituting body. The balance on the committee is best created by first seeing to it that people from the diverse groups that are likely to be effected by the committee's recommendations are represented. In this way they will be sensitive to the reactions of members of these groups to the decisions that might be reached. Further, the committee members must be able to work with and interact with one another and be open to information and ideas that are provided by other experts in the field. This means that a committee that is to work most effectively ought not have as members people who hold opinions at the extremes of the spectrum of ideas that are to be considered. Committee members should hear the opinions of persons with the extreme points of view but should themselves not have fixed points of view. It is best for purposes of constituting an effective deliberative body to exclude from membership individuals who have strongly polarized positions on the issues to be discussed. Committee members must be of a mind that they might be influenced by the information that is presented and the deliberations that take place. If persons without stated positions on the topics being considered cannot be found, finding the representative balance of opinions is critical.

An example of the operation of this process occurred in the deliberations of the Advisory Committee on Bioethics when they were considering the question of the ethical acceptability of in vitro fertilization. It was important to consider the viewpoints of those religious groups who might object to the use of that technology. A distinguished Jesuit scholar was appointed to the Committee. Although he tended to be opposed to the artificial use of reproductive technology his position was changed by some of the scientific information that was presented by consultants to the Committee. He was instrumental in helping the committee arrive at a concensus on the recommendations to the Secretary for limits of research and application of in vitro fertilization technology.

The disease AIDS has created a national climate in which there is considerable controversy about the ways that the disease is transmitted and the best course of action that should be adopted to curb the spread of the disease and the most effective way to spend the available money on research to find ways to treat and prevent the disease. Because there are significant differences in the opinions among experts concerning these and other questions about AIDS the IOM felt that a National Commission on AIDS with an appropriate composition of members from representative fields would be able to maintain a continuing dialog and evaluation of progress and recommend possible courses of action that the appropriate federal agencies might take at critical times. These decisions might have to be made in the face of competing ideas and theories. In this context a Presidential panel on AIDS is a good idea and can serve as a focus of attention for the public education that is needed to calm the hysteria that has arisen in part because of the tremendous amount of conflicting information that has been disseminated. A properly constituted, credible panel could have the effect of bringing a more sensible approach to the development of policies concerning AIDS testing and programs of prevention that are the only way to contain the disease until a vaccine has been developed.

The state of public opinion surrounding the AIDS epidemic is similar to the state of medical and public opinion that existed when genetic screening was first instituted for sickle cell anemia. In the early 1970s there was general hysteria and misinformation in the country and especially in the Black community. There was no central recognized source of accurate information at first. In the guise of doing good, many legislatures passed laws mandating screening prior to entering school and before marriage. These laws were ill-conceived and were later rescinded but only after they had created even more confusion and ill feeling in the Black community. A National Commission on Sickle Cell Disease with the appropriate balance of opinion and expertise among its members might very well have been an effective way to avert much of the confusion that surrounded this disease for years afterward and that is still being dealt with.

A National Commission on AIDS can be instrumental in directing a broad-based national analysis of the problem if the citizens of the United States are to contain and eventually eliminate this serious threat to the nation's health. But this will be a fruitless exercise if the Commission is not reprsentative of those special groups that are disproportionately effected by the disease. If not it will not be respected by the public at large. Earlier it was clear that the AIDS Commission was deficient in representatives of those minority groups at greatest risk for AIDS, namely Blacks and Hispanics. This deficiency has been partly corrected by recent appointments to the Commission. In addition, the creation of a technical advisory group composed of health care providers has helped to address some of the concern about a deficiency of expertise on the Commission of health professionals who have had first hand experience with the disease. For practical purposes it is impossible to have representatives of every conceivable ethnic and professional group on the panel, since the panel would be too big and unwieldy. Those racial or ethnic groups or areas of expertise that aren't represented on the committee should be given an opportunity to have significant input to the deliberative process.

Once the categories of persons needed, including representative - ethnic groups and relevant experts for the Commission have been identified, the critical task is to generate a list of individuals who will be suitable members of the panel. The first step in this process is to appoint a chairman who is knowledgeable about the topic to be considered.After this a list of names of potential panel members is generated for consideration. In my experience the most effective way to generate such a list is to poll the professional societies and specialty organizations for the names of people in specific specialties which are then screened further by the chairman and the staff members of the appointing authority.

With one of the committees I served on this process was used to generate a list so that there were at least three or four names for every position on the panel. Those persons who were not appointed to the panel were given an opportunity to present to the Committee. "Lay" representatives of the panels I have served on were appointed from names povided by special interest oganizations.

No matter what recommendations are provided by the panel or what conclusions are drawn the most important part of the process is that the panel members have productive and meaningful discussions based on the information that they are able to generate as well as the testimony of people repesentive of the range of points of view. If the committee is dominated by a minority or is unable to have meaningful and productive dialog, being careful about the process of constituting the panel will be a useless exercise.

STATEMENT OF WILLIAM RUBENSTEIN

to the

COMMITTEE ON GOVERNMENTAL AFFAIRS

of the

UNITED STATES SENATE

December 3, 1987

I am a staff attorney with the American Civil Liberties Union responsible for tracking the work of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (the "AIDS Commission"). I am submitting this statement to describe the numerous difficulties I have encountered while simply attempting to monitor the work of this Commission. While the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, is theoretically designed to aid members of the public such as myself in following a committee's work, my experience has been that the existence and requirements of the Act come as a complete surprise to the Commissioners and Commission staff, or, if known, are routinely and rather easily ignored.

Accordingly, although I believe some of the problems I have had with the AIDS Commission could be rectified by legislative changes such as those suggested by Mr. Glitzenstein in his testimony, I also conclude that additional steps need to be taken to ensure that appointing authorities, advisory committee members, and their staffs are familiar with the requirements of the law.

I will begin with some background information about the AIDS Commission and then detail the series of obstacles I have encountered in following the work of the Commission. Finally, I will indicate some changes in the law which might make FACA work better for members of the public attempting to follow the work of an advisory committee.

II. Lawsuit

Because the Commission is so skewed in its viewpoints and because it completely excludes AIDS experts as well as representatives of the groups most affected by the AIDS crisis, it has been severely criticized almost from its inception. For instance, Dr. Sheldon Wolff, cochairman of the National Academy of Sciences' study commented that "No panel at all would be preferable to the one we've got," adding that "I would hope, at best, they don't do any harm." Similarly, Dr. David G. Ostrow, a member of the AIDS Expert Advisory Panel of the American Medical Association, criticized the President's appointments as "the most recent example of the politicization of AIDS in the United States."

Knowing that FACA provided a mechanism by which such membership problems could be addressed, the ACLU and Public Citizen Litigation Group delivered a letter to the President and the Secretary of Health and Human Services on September 8, 1987, outlining our objections to the composition of the Commission. The letter asked the President and/or Secretary to correct the deficiencies in the composition of the panel by appointing additional members -- AIDS experts and representatives of affected groups -- to cure the Commission's imbalance. We received no reply from either official for nearly a month. Finally, on October 7, 1987, we received a letter from White House Counsel Arthur Culvahouse denying our request. Culvahouse defended the Commission, justifying its legality by pointing to three specific Commissioners -- then Commission Chairman Eugene Mayberry, head of the Mayo Clinic; then Commission Vice-Chairman Woodrow Myers, State Health Commissioner of Indiana and the Commission's only black member; and Commissioner Frank Lilly, a retrovirologist and the Commission's only gay member.

The day we received Culvahouse's letter, two of the three Commissioners identified in the letter as illustrating the Commission's balance resigned from the Commission. Accordingly, we delivered another letter the following day once again asking that AIDS experts and representatives of affected groups be appointed to the Commission. When we received no reply to that letter, on October 13, 1987, we filed a lawsuit in the federal district court in Washington.

During the pendency of the suit, the White House filled the vacancies on the Commission with two persons with more expertise and more mainstream views than any of the original appointments, adding some needed balance to the Commission. Nonetheless, because the groups most affected by the AIDS crisis -- people with AIDS, people who provide services to people with AIDS, and the minorities groups inordinately affected by AIDS -- are still not represented on the panel, the case continues.

Notwithstanding this attempt to affect the composition of the Commission, I have continued monitoring the work of the Commission itself. The following remarks refer to that effort.

III. Designated Federal Official

The designated federal official ("DFO") of an advisory committee is the person responsible for ensuring that the committee comply with the Federal Advisory Committee Act.[1] Thus, the DFO has must be present at all Commission meetings and has the authority to adjourn such meetings "whenever he determines it to be in the public interest." 5 U.S.C. App. 2, §10(e). In assuring compliance with the Act, the DFO must also ensure that Commission meetings be open to the public, id. at §10(a)(1), and that Commission documents be made available for public inspection, id. at §10(b).[2] Thus because the DFO is

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[1] The pertinent sections of the Federal Advisory Committee Act read:

> (e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.
>
> (f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

See also 41 C.F.R. §101-6.1019, 48 Fed. Reg. 19324, 19329 (April 28, 1983).

[2] These two functions are not specifically designated to the DFO in the Act, although they are -- as is the case with the AIDS Commission -- often performed by that person. The Act actually delegates these functions to each agency's Advisory Committee Management Officer who has the responsibility to "assemble and maintain the reports, records, and other papers of any such committee during its existence; and...[to] carry out, on behalf of that agency, the provisions of [the Freedom of Information Act] with respect to such reports, records, and other papers." 5 U.S.C. App. 2, §8(b)(2), (3). However, in my contacts with officials at HHS it became clear that the HHS Advisory Committee Management Officer did not perform these functions but was more of an administrative official. Thus, in the case of the AIDS Commission the DFO has assumed these functions. Accordingly, for the sake of convenience, throughout my statement I use the DFO as a shorthand means of referring to the official who is responsible for assuring compliance with FACA. The recommendations I make, though, are meant to apply to

(continued...)

the individual who initially processes requests for documents, she must often perform the delicate task of balancing the public's right of access against the Commission's claims of exemption. Given these oversight functions performed by the DFO, it is obvious that such a person should be familiar with the requirements of FACA and the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, and independent of the Commission.

In late August, when I was assigned the task of monitoring the Commission on behalf of the ACLU, I realized I would be attending all Commission meetings and reviewing all the documents the Commission would be looking at. Thus, I immediately set out to identify the Commission's designated federal official, to contact this person, and to explain what I would be doing for the coming year. I travelled to the Commission offices on August 25, 1987, when those offices were still in Rockville, Maryland. At that time, I met with Linda Sheaffer, the then executive secretary of the Commission, as well as with staff members. I explained to them the work I would be doing. I also inquired about the identity of the designated federal official. Neither Ms. Sheaffer nor her staff even knew of FACA's requirement concerning a DFO.

Subsequently, after I had had several problems gaining access to documents (see below), I again attempted to identify the DFO so I could discuss my access problems with that person. In a telephone conversation with Ellen Washington, the Department of Health and Human Services' Committee Management Officer, on September 17, 1987, I was informed that Linda Scheaffer had been appointed as the designated federal official. However, on September 14, 1987, Sheaffer had been fired from her job as the Commission's executive secretary.

On September 18, 1987, I was informed by Richard Loughrey, the Director of the Secretary's Advisory Committee Office, that William J. Walsh, III -- the Commission's second executive secretary -- was the designated federal official for the Commission. Accordingly, in a letter to Mr. Loughrey dated September 23, 1987, I asked him to confirm that Walsh was indeed the designated federal official, and I also asked if there might not be a conflict of interest since Walsh, the designated official, was also a member of the Commission's staff.

In a letter dated October 16, 1987, Mr. Walsh wrote that he had been appointed the DFO on September 18, 1987, and that prior

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[2] (...continued) whichever official -- the DFO or the Advisory Committee Management Officer -- is ultimately deemed responsible for assuring compliance with FACA.

to that time, Ms. Sheaffer had been the DFO. Mr. Walsh also wrote:

> I have discussed with Mr. Loughrey your concern regarding a potential conflict between my staff duties on the Commission with my role as designated federal official. We do not perceive a conflict of interest in this situation nor do we see any other problem with this arrangement under the Federal Advisory Committee Act.

Although Mr. Walsh's response was dated October 16, 1987, on that same date, at a Commission meeting at the State Department, the Commission's third executive director Polly Gault introduced herself as the designated federal official of the Commission. Accordingly, I sent yet another letter to the Commission dated October 22, 1987, in which I once again inquired about the identity of the DFO and once again asked whether the DFO could be a Commission employee. Though I never received a formal response to that request, I have been told that Ms. Gault is definitely the DFO[3] and that the Commission's lawyers believe her appointment as DFO raises no potential conflicts of interest. Since her appointment as executive director, Ms. Gault has acted as DFO and has been the person responding to my formal requests for documents.

Despite the fact that, some four months into the Commission's work, I have finally been able to identify the DFO with whom to correspond about access problems, I remain terribly troubled by my experience for several reasons. First, the Commission was operating for a solid two months before anybody could tell me who its designated federal official was. Second, in the two months that have elapsed since then, three different persons have served as DFO. Third, none of these people have been even remotely familiar with the requirements of FACA. Fourth, all three of these DFOs have been Commission staff members, lacking the expertise and independence to fairly handle the DFO responsibilities.

The lack of a DFO who is familiar with and appreciative of the requirements of the FACA and independent of the Commission has, I believed, contributed in a large measure to the problems I have had with access to meetings and documents that I describe below. If there had been an independent DFO, preferably a lawyer familiar with FACA and FOIA, assigned to the Commission from its inception, I would not have had to spend several frustrating months simply attempting to identify to whom I was to address questions. Moreover, I would have been able to save the countless hours I have spent explaining the requirements of FACA to uninformed, albeit well-intentioned, DFOs. Indeed, to this day, though Ms. Gault is the DFO and correspondent of my requests, it is appears to me that the letters she sends me are written by HHS lawyers.[4] Why does the Commission need this extra layer of aggravation? The agency lawyer should simply be designated as the federal official and should work with the Commission advising it of the requirements of the law.

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[3] Mr. Walsh is no longer with the Commission.

IV. Document Access

FACA requires that the Commission establish a reading room or library and have available for public inspection copies of all of its documents.[5] The idea implicit in this construction is that the Commissioners and Commission staff have a responsibility to save and archive appropriate documents and that the public should be able to visit the Commission offices and have access to these documents. The AIDS Commission and its staff have never truly understood this standard, much less approached compliance with it.

A. The Commission's Failure to Save Documents and Open a Reading Room

My initial concern about document access was not that I would be denied access to documents (that only came later) but that in the chaos that has characterized this Commission, important documents, correspondence, etc. would not be properly filed for public inspection. The chaos is obvious -- in four months the Commission has had two different offices, three sets of executive directors, innumerable staff persons from governmental agencies passing through on temporary assignments, personal staffers of various Commissioners coming and going from the Commission offices, and Commissioners themselves quitting. What underlies the chaos is a complete ignorance by all of these countless people about the legal requirements for saving Commission documents for public inspection.

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[4] Mr. Walsh, the former DFO, acknowledged to me that this was the process by which the DFOs corresponded with the public. At the October 16, 1987 meeting, he told me he had "just seen and signed a letter" to me.

[5] The pertinent section of the Act reads:

> Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. App. 2, §10(b).

Accordingly, I spent a good deal of time in September simply attempting to identify somebody who could inform the Commission members and the Commission staff of its responsibilities to the public in this regard.6/ Failing to find such a responsible public official, I had to spend time on my own attempting to educate the Commission and its staff about the legal requirements for document access. I have discussed these requirements with all three executive directors the Commission has had, with Commission staff members, and with Commissioners themselves. On several occasions during this time period, I also discussed with lawyers from HHS my concern that, because of the chaos at the Commission, documents might be innocently destroyed and my concern that the Commission establish and maintain a library as the law requires. These efforts appear to have finally proved fruitful -- at a closed session on October 15, 1987, lawyers from the Department of Health and Human Services appear to have briefed the Commissioners on the requirements of FACA.7/ I do not know if the Commission staff has been briefed on these legal requirements.

Despite this briefing, to the best of my knowledge the Commission does not, to this day, have a reading room or library. I did go to the Commission offices to inspect public documents on one occasion, on September 30, 1987, and I was ushered to an empty conference room. I asked to inspect a number of documents, all of which I was told were not available except for a transcript of the first Commission meeting. Because it was clear to me that nobody on the Commission or on the Commission staff had any idea about the legal requirements for archiving and making documents available, I thought that I could best protect my rights by writing formal requests for documents to the Commission. I also thought these formal requests might urge the Commission and its staff to begin properly storing documents.

6/ Specifically, I had hoped there would be a DFO to undertake this task; however, as my comments above indicate, such a knowledgeable and independent person never emerged.

7/ Because the minutes of the meeting which I received from the Commission were repeatedly redacted, I cannot say for certain that the Commissioners have been briefed on the legal requirements of saving and storing documents and the public's right of access to such documents.

B. The Process of Formal Requests

Although I have been forced to resort to submitting these formal requests for documents, it is not without some hesitation. The law clearly requires that documents "shall be available for public inspection and copying." 5 U.S.C. App. 2, §10(b). Such a requirement, once again, means that a member of the public should be able to walk into the Commission offices and gain access to pertinent documents without having to file formal requests and go through formal channels.

Moreover, I have encountered two major problems merely in the process of making these formal requests -- first, this procedure has been used to delay and frustrate my access to documents; and second, the procedure the Commission has established for handling these requests utilizes non-objective Commission personnel as information officers and thus is inherently flawed.

1. Frustration and Delay

The first formal request I made was on on September 23, 1987, in which I noted that I would come to the Commission offices on September 30 to obtain the requested documents. As I mentioned earlier, my visit to the Commission offices on the 30th was completely unfruitful. Notwithstanding this visit, I received a letter in response to my request on October 16, 1987 telling me that "the documents to which you are entitled to have access are available [at the Commission's offices]." The person who signed this letter, William J. Walsh III, knew full well that I had come to the Commission offices on September 30, 1987 and had, at that time, been denied access to the documents requested.

Accordingly, on October 22, 1987, I wrote a follow-up letter requesting the documents be sent to me and initiating a second round of formal requests. I did not receive any documents in response to these requests until November 23, 1987 and November 24, 1987. On those days I received two packages of documents and notification that some of my requests had been denied. I was informed that I had a right to appeal these denials -- but the person to whom I was told to appeal is Admiral James D. Watkins, the Commission's Chairman.

2. Inherently Flawed Procedure

As I mentioned earlier, I was initially surprised that the DFO -- the person to whom I address my requests for documents -- was not an independent information specialist familiar with the legal requirements of the FACA and FOIA (as in the agencies' FOIA offices) but instead the executive director of the Commission itself. It should be obvious that an employee of the Commission itself does not have the necessary distance from the Commission's work to objectively assess the releasability of Commission documents. Nonetheless, I assumed that I would, at the very least, have the opportunity to appeal her decisions to an independent arbiter.

I was, therefore, stunned to be informed that appeals would be taken by the chairman of the Commission; if the Commission's executive director did not have a conflict concerning release of documents, certainly the Commission's chairman would. One can imagine a myriad of circumstances under which a Commission chairman would not want Commission documents released. Indeed, the entire purpose of the access provisions generally and those in FACA specifically is to protect against Commission secrecy by giving the public a mechanism to gain access to its work. This mechanism is completely perverted by a determination that the two central Commission officers -- its executive director and its chairman -- will be the officials responsible for determining the extent of the public access to the Commission's work.

C. Draft Documents

Beyond the general concerns with the process for getting documents from the Commission -- the lack of a reading room which forced me to resort to formal requests and the designation of interested officials to process these requests -- one major access issue has emerged as particularly troublesome. This issue concerns the release of draft documents to the public, particularly in the event that the Commission has planned a public meeting to discuss these drafts. FACA is quite explicit on this point -- the Act required the release of "drafts." 5 U.S.C. App. 2, §10(b). This is consistent with the general provision of the Act requiring all Commission meeting be public, 5 U.S.C. App. 2, §10(a)(1). A public meeting convened to discuss a document -- for instance a draft of a report -- would be meaningless to the public unless and until the public had access to the document under discussion. Accordingly, the Act requires the release of such drafts, obviously intending they be released _before_ a meeting convened to discuss their content.

Several years ago, the issue of the accessibility of drafts reports of the Attorney General's Commission on Pornography ("the Meese Commission") arose. The ACLU litigated this issue in the federal district court in Washington and settled the case when the Justice Department, conceding that such drafts were accessible, simply released the documents in question. _American Civil Liberties Union v. Attorney General's Commission on Pornography_, Civil Action 86-0893 (D.D.C. 1986)(Sporkin, J.). Notwithstanding the fact that the Justice Department has effectively conceded this point, the AIDS Commission has already refused to turn over such documents on two occasions.

1. _Brochure_

The first such occasion concerned the first Commission meeting. Late in August, I received a copy of the agenda for the first AIDS Commission meeting. On the agenda for the second day of this meeting, September 10, 1987, was an item entitled, "Commission Deliberation on Proposed HHS Mailing of Brochure 'America Responds to AIDS.'" I immediately attempted to get a copy of this brochure from the Commission, but its then-executive secretary Linda Sheaffer refused to return my calls. I was able to speak with another Commission staff member, William J. Walsh III, about the brochure, and he informed me that the Commission was under orders from HHS not to release it.

I then telephoned Gary Noble at HHS who told me that as far as he was concerned, it was the Commission's document and it was therefore the Commission's decision whether or not to release it. I called Linda Sheaffer back and she informed me that she was under different orders from the White House and that she would have to speak with the lawyers at HHS and get back to me. Although she never did get back to me, I persisted in my calls to her and finally she told me that the lawyers at HHS had informed her that she could not release the brochure. I attempted to reach the General Counsel at HHS for more than a week but he never returned my calls. All of this took place between August 20, 1987 and September 8, 1987.

When I arrived for the Commission's meeting on September 9, 1987, I was handed a different agenda which excluded any mention that the Commission would deliberate on the brochure. The Commissioners stated during the meetings on the 9th and 10th of September that they did not take up deliberations about the brochure because they were just starting their work and found such a task premature.[8]

2. Draft of Interim Report

The second incident concerning release of a draft document has occurred in the past few weeks. On November 10, 1987, the Commission published a notice in the Federal Register announcing a meeting for November 24, 1987 at which time the Commission would discuss "the content of the interim report." 52 Fed. Reg. 43270 (November 10, 1987).[9] Suspecting that the Commission would at that time go over a draft of this report, I federal expressed a letter asking for copies of the draft to the Commission on November 16, 1987. Having never received any response to this letter, I phoned the Commission's lawyers on Thursday, November 19, 1987. I was told by the lawyer that my request would be handled as a standard FOIA request and that therefore, the Commission did not have to tell me whether they would release such a draft until ten days after my request, which, of course, was long after the meeting in question.

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[8] Nonetheless, because the brochure was made available to the Commissioners, it must be made available to the public and thus, in a letter dated September 22, 1987, I requested a copy of the document. When I visited the Commission offices on September 30, 1987, I was told that they did not have a copy of the brochure. Finally, when on November 25, 1987, I received a response to document requests I had made on September 22, 1987, said response included a copy of the brochure. Handwritten on its cover is the notation "September 30 released--Public Affairs."

[9] The Commission is required to submit an interim report to the President 90 days from the July 23, 1987 appointment of its members. Executive Order 12601, 52 Fed. Reg. 24129 (June 29, (continued...)

The lawyer I spoke with was completely unmoved by the fact that FACA does not have a ten day waiting period for document requests but rather requires that Commission documents "shall be available for public inspection." She also appeared unfazed that the ACLU had litigated this exact issue last year and that in that case the Justice Department had agreed to make the drafts in question available.

It is difficult to imagine why this Commission wants to make an issue out of releasing its drafts when the law clearly states that drafts shall be made available for public inspection. After the ten day waiting period has expired and I can inspect what the Commission does make available, I hope to be able to establish a better mechanism for access to such documents in the future. I can only hope that the frustrating chaos, ignorance, and stonewalling I have met with in the past few months will not characterize the life of this Commission.

VI. Conclusions

In conclusion, my experience as a member of the public attempting to track the work of the AIDS Commission prompts me to recommend that this Committee amend FACA to ensure that advisory committee members and their staffs are aware of and sensitive to the legal requirements of the Act. Specifically, I suggest the following[10/]:

1. Advisory committees should have designated federal officials who are independent of the committee and familiar with the legal requirements of FACA and FOIA.

[9/] (...continued) 1987). Although it would appear, therefore, that a preliminary report was due not later than October 21, 1987, the Commission has targeted December 7, 1987, as the date for its interim report.

[10/] As I mentioned above, whether the DFO or the Advisory Committee Management Officer fulfills these functions is not relevant to my recommendations -- only that the function is performed by some informed and independent official.

2. These DFOs should be required to ensure compliance with all aspects of the FACA.

3. These DFOs should be required to familiarize the Commissioners and Commission staff with their legal responsibilities.

4. This independent DFO should be responsible for making the substantive decisions about which documents are made available for public inspection.

5. Such documents shall be readily available for inspection, as the law requires, not made available only through the 10-day FOIA mechanism.

6. Any such decisions should be appealable to a neutral and independent information specialist.

As these recommendations indicate, my problems in following the work of the AIDS Commission result not from any particular deviousness on the part of the Commission and its staff, but rather from the Commission's -- and the staff's -- ignorance about the legal requirements of FACA. While the Commission must abide by and comply with FACA, it cannot be assumed to know and appreciate what FACA requires. That oversight must come from independent officials versed in the legal requirements of the Act and detached from the work of the Commission. The failure as to this Commission has in some sense been the lack of this oversight mechanism. In short, the law must be strengthened to ensure that someone takes -- and takes seriously -- the responsibility for ensuring that advisory committees like the AIDS Commission comply with FACA.

STATEMENT OF PAUL T. WEISS
ASSOCIATE ADMINISTRATOR FOR ADMINISTRATION
U.S. GENERAL SERVICES ADMINISTRATION
BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
OF THE SENATE OF THE UNITED STATES
ON THE FEDERAL ADVISORY COMMITTEE ACT

MR. CHAIRMAN, THANK YOU FOR THE OPPORTUNITY TO TESTIFY TODAY ON ACTIONS TAKEN BY THE GENERAL SERVICES ADMINISTRATION (GSA) TO IMPLEMENT THE FEDERAL ADVISORY COMMITTEE ACT (FACA) WITHIN THE EXECUTIVE BRANCH. ACCOMPANYING ME TODAY IS MR. JAMES L. DEAN, DIRECTOR OF THE COMMITTEE MANAGEMENT SECRETARIAT. THE SECRETARIAT, MANDATED BY SECTION 7(A) OF THE ACT, IS RESPONSIBLE FOR THE DIRECTION OF GSA'S ACTIVITIES TO PROVIDE GOVERNMENTWIDE OVERSIGHT OF ALL FEDERAL ADVISORY COMMITTEES.

UNDER THE PROVISIONS OF REORGANIZATION PLAN NUMBER 1 OF 1977 AND EXECUTIVE ORDER 12024, ALL RESPONSIBILITIES FOR IMPLEMENTING THE FEDERAL ADVISORY COMMITTEE ACT, EXCEPT THAT OF TRANSMITTING THE ANNUAL REPORT OF THE PRESIDENT ON FEDERAL ADVISORY COMMITTEES TO THE CONGRESS, REQUIRED BY SECTION 6(C), WERE TRANSFERRED FROM THE OFFICE OF MANAGEMENT AND BUDGET (OMB) TO GSA. UNDER THE provisions of the Act, GSA assumed responsibility for:

-- Establishing and maintaining a management structure, through the Committee Management Secretariat, designed to provide oversight, guidance, and other types of support to Federal departments and agencies sponsoring advisory committees as defined by FACA;

-- Preparing and submitting the *Annual Report of the President on Federal Advisory Committees* to the President for transmittal to the Congress;

-- Conducting the annual comprehensive review of all Federal advisory committees, required by section 7(b) of the Act;

-- Assuring that formal actions taken by the heads of Federal departments and agencies to establish advisory committees are consistent with FACA. This function is governed by the provision of section 9(a)(2) of the Act, requiring consultation between GSA and Executive Branch agencies prior to the establishment of advisory committees;

-- ESTABLISHING SUCH OTHER MANAGEMENT CONTROLS AS ARE NECESSARY TO IMPLEMENT THE ACT, INCLUDING PROVISIONS REGARDING PUBLIC PARTICIPATION IN ADVISORY COMMITTEE ACTIVITIES AND THE AVAILABILITY OF COMMITTEE RECORDS; AND,

-- SETTING FAIR RATES OF PAY FOR ADVISORY COMMITTEE MEMBERS, IN CONJUNCTION WITH THE OFFICE OF PERSONNEL MANAGEMENT.

THIS DECEMBER WILL MARK THE 10TH ANNIVERSARY OF THE COMMITTEE MANAGEMENT SECRETARIAT'S TRANSFER TO GSA. DURING THIS PERIOD OF TIME, THE SECRETARIAT HAS CONTINUED TO ADAPT ITS OPERATIONS TO THE CHANGING ENVIRONMENTS WITHIN WHICH FEDERAL ADVISORY COMMITTEES MUST OPERATE.

DURING THE PAST 10 YEARS, THE SECRETARIAT HAS SOUGHT TO FULFILL ITS RESPONSIBILITIES THROUGH THE APPROPRIATE APPLICATION OF MANAGEMENT CONTROLS, DESIGNED PRIMARILY TO SCRUTINIZE FEDERAL ADVISORY COMMITTEES FOR COMPLIANCE WITH FACA AT THE TIME THEY ARE ESTABLISHED. THE UNIT ALSO HAS SERVED AS A SOURCE OF ADVICE AND ASSISTANCE TO A BROAD SPECTRUM OF ORGANIZATIONS AND INDIVIDUALS, INCLUDING THE CONGRESS, THE PUBLIC, AND OTHERS, HAVING AN INTEREST IN THE OPERATION OF THE ACT.

From the time of its transfer to GSA in 1977 until 1983, the Secretariat utilized the provisions of OMB Circular A-63 as the basis for administering FACA within the Executive Branch. During 1983, GSA issued an interim regulation designed to address its responsibilities under section 7(c) of the Act. Refinements in GSA's approach to ensure the implementation of FACA consistent with the law's provisions have culminated in the completion of a new Final Rule, which is expected to be published in the Federal Register during December 1987. GSA believes this guidance, combined with other initiatives which will be addressed later in this testimony will provide a firm foundation which the Executive Branch may utilize in strengthening efforts to maximize the effectiveness and efficiency of advisory committees.

The Secretariat's most highly visible role is that of "consulting" with the heads of Federal departments and agencies prior to the establishment of advisory committees. While the Act does not define the act of consultation, required by section 9(a)(2), the Secretariat has configured the process to include:

-- A review of all charters for consistency with the requirements of FACA, encompassing the provision of information pertaining to a proposed committee's mission, the resources allocated to accomplish the stated objectives, certification of adherence to the

Act's provisions concerning open meetings and balanced membership, the authority for its creation, and the time period necessary for the accomplishment of its work. (In the case of advisory committees established by the President through Executive Order, or by the Congress through law, consultation is not required.);

- Identification of potential problems stemming from the establishment of a proposed committee, including possible duplication of effort with other groups;
- Selective assistance from other sources of information, such as the Office of Management and Budget, to assess the circumstances surrounding a proposed committee; and
- Discussions with Committee Management Officers to seek additional information, suggest issues which should be addressed, and provide assistance in expediting all necessary documentation.

Mr. Chairman, you asked GSA to describe the consultation process as it specifically related to the Presidential Commission on the Human Immunodeficiency Virus Epidemic (the "AIDS Commission"). In the case of Federal advisory committees which are established by the President, through Executive Order, or the

Congress, by law, FACA does not require the consultation process to take place. The AIDS Commission was established by the President on June 24, 1987 through Executive Order 12601, as amended by Executive Order 12603 of July 16, 1987. Accordingly, while GSA was provided with an advance copy of the Presidential directive, consultation between the Committee Management Secretariat and the White House was not required.

The Secretary of Health and Human Services serves as the President's Executive Agent for the Commission and is responsible for providing the support necessary for the accomplishment of the group's mission.

During fiscal year 1987, the average time required to complete the consultation process for approximately 140 committee establishments, renewals, and reestablishments was 12.6 days. For fiscal year 1988, GSA has established an internal goal of processing all such actions within a 10-day timeframe. This will be accomplished with the aid of streamlined internal procedures, including a new requirement in GSA's Final Rule on Federal Advisory Committee Management that all consultations be provided directly to the Secretariat, and the application of enhanced data processing resources.

During fiscal year 1988, the Secretariat will also initiate a process to increase emphasis upon evaluating the adequacy and effectiveness of existing management controls within Federal departments and agencies aimed at assuring compliance with FACA. This process will be developed in conjunction with all Committee Management Officers, through GSA's recently-established Inter-agency Committee on Federal Advisory Committee Management.

GSA has also initiated other actions to improve its oversight role. During fiscal year 1987, GSA collaborated with the President's Council on Management Improvement (PCMI) to review the results of recent efforts to control the growth and costs of Federal advisory committees, while assuring their effective operation. The results of that effort confirm that past initiatives to bring advisory committees under effective Executive Branch control have been successful. For example, during the 10-year period under review, average annual cost increases were in the neighborhood of 2.8%, well below the rate of inflation (Chart 1). And, while the number of certain types of committees has increased, the total number of committees in existence has shown a reduction of 26%. Since 1979, the total inventory has remained relatively static, with approximately 1,000 committees of all types in existence at any given time. The number of committees in existence at the end of each year during the past decade has tended to remain below 900 (Chart 2). This decline occurred between 1977 and 1979 and resulted from

INCREASED EMPHASIS PLACED BY FEDERAL DEPARTMENTS AND AGENCIES ON IMPROVING THEIR COMMITTEE MANAGEMENT ACTIVITIES.

OTHER SIGNIFICANT INDICATORS OF OVERALL MANAGEMENT OF FEDERAL ADVISORY COMMITTEES GENERATED BY THE PCMI EFFORT REFLECT THAT:

-- THE NUMBER OF COMMITTEES TERMINATED HAS EXCEEDED THE NUMBER OF COMMITTEES ESTABLISHED DURING 7 OF THE PAST 10 YEARS (CHART 3).

-- THE INCREASED PRESENCE OF LARGE, RESOURCE-INTENSIVE, ADVISORY COMMITTEES ESTABLISHED BY THE PRESIDENT, DEPARTMENTS AND AGENCIES, AND THE CONGRESS TO ADDRESS COMPLEX NATIONAL ISSUES HAS REQUIRED A SIGNIFICANT PERCENTAGE OF THE TOTAL RESOURCES DEVOTED TO ADVISORY COMMITTEES. IN 1984, FOR EXAMPLE, THE "TOP 20" COMMITTEES FALLING INTO THIS CATEGORY ACCOUNTED FOR 31.3% OF TOTAL COSTS, ALTHOUGH REPRESENTING ONLY 2.5% OF THE TOTAL INVENTORY.

-- THE NUMBER OF CONGRESSIONALLY-AUTHORIZED COMMITTEES (THOSE OVER WHICH AGENCIES HAVE DISCRETION) HAS DECLINED BY APPROXIMATELY 76%. HOWEVER, THE NUMBER OF CONGRESSIONALLY-DIRECTED (NON-DISCRETIONARY) COMMITTEES HAS DOUBLED SINCE 1977 (CHART 4).

-- The number of committees established under Presidential authority has remained relatively constant.

-- During the period of 1983 - 1986 expenditures for Federal member compensation and non-Federal member compensation have declined by 79% and 7.5% respectively (Chart 5). Costs associated with Federal staff support have increased by 16.8% during the same period. Federal staff support now accounts for the single largest category of resource consumption, which was 49.7% during 1986, largely due to the assignment of senior staff to support committee missions.

-- Costs associated with the use of paid consultants to support committee activities has decreased from 11.7% of total costs in 1983 to 6.7% of total reported costs during 1986.

-- Travel and per diem costs have increased by 20.4% over the 1983 - 1986 period, from $13.7 million to $16.5 million. However, as a percentage of total costs, these expenditures have increased by 10.5%.

The Secretariat has played an important role in controlling the growth and costs of Federal advisory committees. Yet, GSA believes that its contribution can be more substantial through improved communications with Federal departments and agencies sponsoring advisory committees and by strengthening the capacity of Committee Management Officers to deal effectively with a myriad of complex issues facing them on a daily basis.

Part of this effort will entail actions to seek amendments to FACA which will result in clearer definitions of the respective roles of the Congress, GSA, and the agencies and the requirements governing their actions. Another effort on the part of the Secretariat will be undertaken to promote increased access to resources, such as specialized training and practical guidance, which will facilitate the management of advisory committees on a day-to-day basis. Combined, these two efforts (we believe) will lead to long-term improvements in compliance with FACA and the effective utilization of committee resources.

While GSA is committed to making whatever administrative improvements possible to improve compliance with the Act and the

EFFECTIVE OPERATION OF ADVISORY COMMITTEES IN GENERAL, IT IS EVIDENT THAT LEGISLATIVE ACTION IS REQUIRED TO FACILITATE THIS EFFORT. IN PARTICULAR, FEDERAL DEPARTMENTS AND AGENCIES WOULD BENEFIT THROUGH CLARIFICATION OF THE ACT'S PROVISIONS RELATING TO BALANCED MEMBERSHIP, AND PROCEDURES FOR DETERMINING WHEN THE ACT APPLIES TO MEETINGS BETWEEN FEDERAL OFFICIALS AND MEMBERS OF THE PRIVATE SECTOR. LACK OF DEFINITIVE GUIDANCE IN THESE AREAS HAS GENERATED UNCERTAINTY WITHIN THE EXECUTIVE BRANCH AS TO THE ACT'S SCOPE.

THE NUMBER AND RANGE OF ISSUES GROWING OUT OF THESE UNCERTAINTIES ARE AS DIVERSE IN NATURE AS THE COMMITTEES THEMSELVES. GSA HAS ATTEMPTED TO DEAL WITH SEVERAL OF THESE ISSUES, SUCH AS THE APPLICATION OF FACA TO SUBCOMMITTEES WHICH DO NOT PROVIDE ADVICE DIRECTLY TO A FEDERAL OFFICIAL, ADMINISTRATIVELY. HOWEVER, THE IMPLEMENTATION OF THE ACT'S INTENT IN THIS AREA, AS WELL AS SEVERAL OTHERS, COULD BE IMPROVED THROUGH REVISIONS TO APPROPRIATE SECTIONS TO ADD GREATER CLARITY AND CERTAINTY REGARDING THE SCOPE OF CONGRESSIONAL INTENT.

IN CONSIDERING LEGISLATION TO AMEND FACA, WE BELIEVE CONGRESS SHOULD ENSURE THAT ANY SUCH PROPOSAL, AT A MINIMUM, IS DESIGNED TO:

-- Clarify the definition of an "advisory committee" as it relates to FACA. The current definition is exceptionally broad: "The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof...which is...established by statute or reorganization plan, or established or utilized by the President, or one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government..."

The definition of an "advisory committee" is so broad that it has led many individuals within and outside of government to suggest that the Act may have resulted in less compliance with its intent by discouraging the formation of such groups, or, in extreme cases, encouraging organizations to not fully identify the true nature of groups set up to provide advice. Although there is no conclusive evidence to support these notions, the fact that such perceptions persist is of significance and should be addressed.

In its in-depth review of Federal advisory committee management, the Charles F. Kettering Foundation noted that the effect of court decisions in this area has served to cloud, rather than clarify, the circumstances under which FACA applies to meetings held by Federal officials for the purpose of obtaining outside advice. The report suggested the development of criteria by GSA to assist agencies in making these determinations. GSA has provided as much guidance as possible with regard to these issues in its regulations, but believes that only Congress is in the ultimate position to clarify its intent.

-- Clarify the definition of what constitutes a "meeting" under FACA. On many occasions, advisory committees, particularly those created by the Executive Branch and the Congress to advise the President, find it desirable to convene for the purpose of addressing administrative details related to their missions, or for other purposes unrelated to the process of developing or recommending positions which will be considered by Federal officials. Under current interpretations of when such a gathering might trigger FACA's provisions, advisory committees are forced to conduct the majority

OF SUCH "HOUSEKEEPING" DUTIES IN FULL VIEW OF THE PUBLIC, WITH ALL ATTENDANT REGULATIONS, SUCH AS THOSE CALLING FOR ADVANCE NOTICE IN THE FEDERAL REGISTER, COMING INTO PLAY. GSA BELIEVES THAT ADVISORY COMMITTEES SHOULD BE AFFORDED ADDITIONAL FLEXIBILITY TO MANAGE THEIR OPERATIONS, SO LONG AS APPROPRIATE MANAGEMENT CONTROLS ARE DEVELOPED AND MAINTAINED TO PROTECT THE PUBLIC'S INTEREST IN THE OUTCOME OF A COMMITTEE'S ACTIVITIES.

-- PROVIDE INCREASED FLEXIBILITY TO TERMINATE COMMITTEES CREATED BY STATUTE. THE NUMBER OF COMMITTEES DIRECTED BY THE CONGRESS, AS A PERCENTAGE OF THE TOTAL INVENTORY, HAS DOUBLED OVER THE PAST 10 YEARS. WHILE THE MAJORITY OF THESE COMMITTEES NO DOUBT SERVE USEFUL PURPOSES, MANY ARE ESTABLISHED WITH NO FIXED DATE FOR TERMINATION. CONSEQUENTLY, WHEN SUCH GROUPS HAVE ACCOMPLISHED THEIR MISSIONS, FEDERAL DEPARTMENTS AND AGENCIES ARE HINDERED IN THEIR EFFORTS TO COMPLY WITH FACA'S PROVISIONS FOR TERMINATING UNNEEDED ADVISORY COMMITTEES BY THE NECESSITY OF ENTERING AN OFTENTIMES PROTRACTED PROCESS OF SEEKING LEGISLATIVE RELIEF.

GSA believes that compliance with FACA would be improved through an amendment to the Act permitting administrative termination of statutorily-created committees, with appropriate consultation with Congress and coordination with the Committee Management Secretariat.

-- Redefining the requirement for regular reviews of governmentwide committee management activities. Section 7(b) of FACA currently requires an annual comprehensive review of all Federal advisory committees. While GSA believes the intent of this section to be sound, it believes other options should be considered in evaluating the effectiveness and efficiency of individual committee operations.

One option which should be considered is that of conducting reviews of committee activities on a cyclical basis. By tailoring the extent to which committees are reviewed in relationship to such factors as their longevity, missions, history of past review by internal organizations (by management staffs and Inspectors General, for example), and track records, the resources of GSA and Federal departments

COULD BE BETTER MAXIMIZED. AS A PART OF A BROADER MATRIX OF MANAGEMENT CONTROLS, CYCLICAL REVIEWS WOULD POTENTIALLY RESULT IN BETTER ASSESSMENTS OF A COMMITTEE'S ACCOMPLISHMENTS AND FUTURE PROSPECTS. IN ADDITION, BY LIMITING THE ANNUAL REVIEW PROCESS, COMMITTEE MANAGEMENT STAFFS WOULD BE FREE TO DEVOTE MORE TIME TO ASSURING THAT OTHER REQUIREMENTS MANDATED BY FACA ARE BEING ADDRESSED.

-- CLARIFY THE REQUIREMENT FOR "BALANCED MEMBERSHIP", CONTAINED IN SECTION 5 OF FACA, IN SELECTING INDIVIDUALS FOR SERVICE ON ADVISORY COMMITTEES. SINCE IT IS CLEAR FROM THE LEGISLATIVE HISTORY OF THE ACT THAT THE ISSUE OF BALANCE IS CENTRAL, THE SCOPE OF SECTION 5 SHOULD BE CLARIFIED.

-- REVISE THE DEADLINE FOR THE SUBMISSION OF THE ANNUAL REPORT OF THE PRESIDENT ON FEDERAL ADVISORY COMMITTEES TO THE CONGRESS. THE CURRENT DEADLINE FOR TRANSMITTING THE ANNUAL REPORT, REQUIRED BY SECTION 6(C), IS INCONSISTENT WITH THE CONGRESSIONAL SCHEDULE AND SHOULD BE REVISED TO PROVIDE FOR TRANSMITTAL BY THE PRESIDENT WITHIN A SPECIFIED TIME PERIOD FOLLOWING THE CONCLUSION OF THE WINTER RECESS.

-- DELETE SECTION 7(E) OF THE ACT, PROVIDING FOR THE PROVISION OF BUDGET RECOMMENDATIONS RELATING TO FEDERAL ADVISORY COMMITTEES. GSA BELIEVES THAT THE DEVELOPMENT OF BUDGET RECOMMENDATIONS IS AN INTEGRAL PART OF OMB'S RESPONSIBILITIES. AS SUCH, EXPENSES FOR ADVISORY COMMITTEES ARE DEVELOPED AS PART OF THE ANNUAL BUDGET PREPARATION PROCESS.

GSA WOULD BE PLEASED TO WORK WITH THE COMMITTEE ON THE ISSUES WE HAVE RAISED, INCLUDING THOSE THAT LEND THEMSELVES TO RESOLUTION THROUGH AMENDMENTS TO FACA. THERE MAY BE OTHERS THAT OCCUR TO US AT A LATER DATE, OR WHICH MAY BE SUGGESTED BY CONGRESS, THE ADMINISTRATION, OR THE AGENCIES. WE WILL BE HAPPY TO CONSIDER THESE AS WELL.

MR. CHAIRMAN, YOU ALSO REQUESTED OUR VIEWS REGARDING WHETHER OR NOT THE COMMITTEE MANAGEMENT SECRETARIAT SHOULD REMAIN WITH GSA. BASED UPON GSA'S PLANS FOR THE SECRETARIAT AND ITS INSTITUTIONALIZED ROLE IN CONTROLLING THE GROWTH AND COSTS OF FEDERAL ADVISORY COMMITTEES, WE BELIEVE THAT THE UNIT SHOULD REMAIN IN ITS PRESENT LOCATION. IN ADDITION, WE BELIEVE THAT GSA IS IN THE BEST POSITION TO PROVIDE THE TYPE OF BROAD SUPPORT ENVISIONED BY FACA.

We believe that GSA's proactive approach to fulfilling the legislative intent of the Act, combined with its 10-year experience in dealing with the many issues engendered by FACA's requirements, will continue to result in improvements in the way Federal advisory committees are managed.

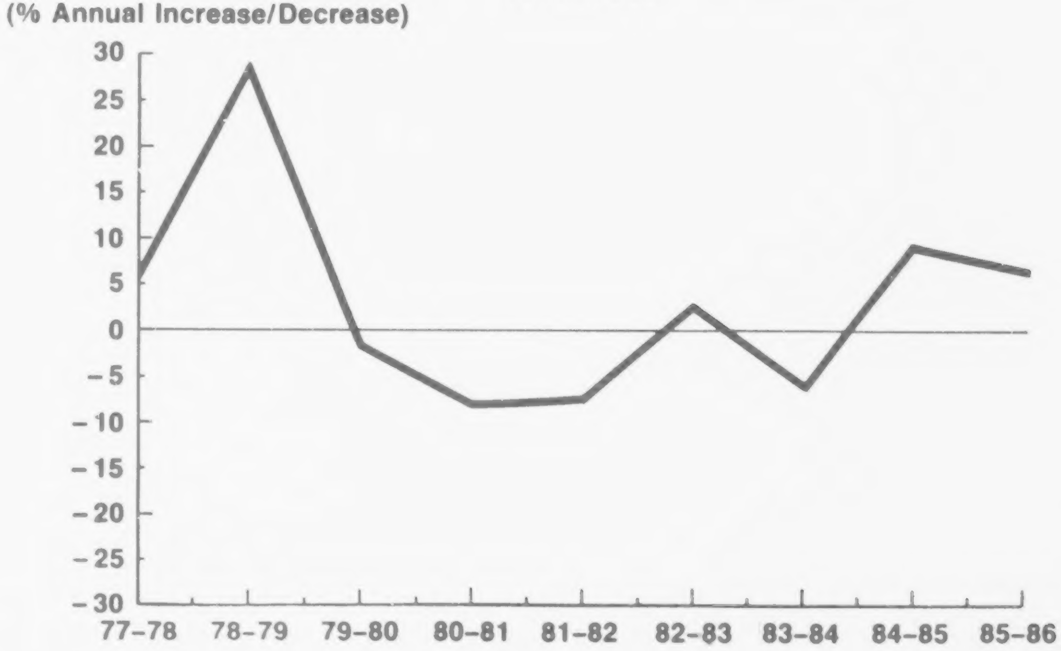
Finally, Mr. Chairman, you inquired as to the reasons why GSA eliminated the requirement for agencies to update committee membership lists on a quarterly basis. As you know, the Act requires that membership lists be provided to GSA on an annual basis. There is no requirement in FACA for the preparation of this information on a more frequent basis, nor has any compelling need for its compilation been demonstrated.

GSA's original purpose for requiring quarterly reports was to provide a basis for improved recordkeeping and access to information which might be useful in recruiting committee members consistent with the President's voluntarism policy. However, experience with this approach indicated that the actual benefits achieved were far outweighed by the additional reporting costs involved. Accordingly, this requirement was eliminated through administrative action during fiscal year 1986.

Mr. Chairman, this concludes my prepared statement. I will take any questions you may have at this point.

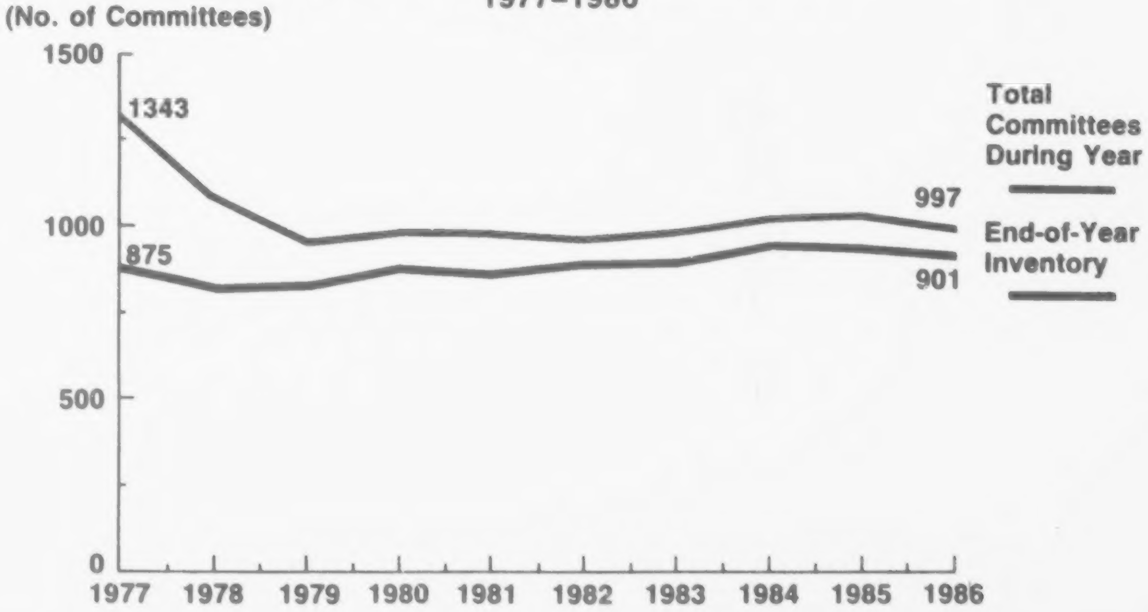
U.S. Senate Committee on Governmental Affairs
Hearings on the Federal Advisory Committee Act (FACA)

Annual Changes in Committee Expenditures
1977–1986

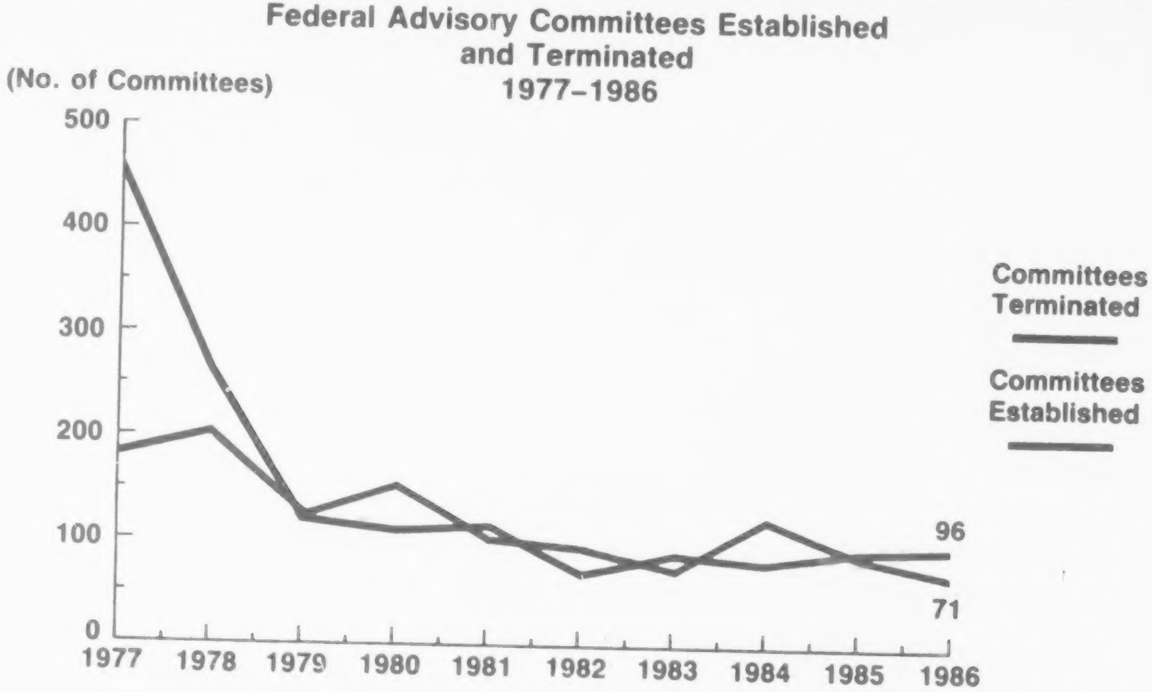


U.S. Senate Committee on Governmental Affairs
Hearings on the Federal Advisory Committee Act (FACA)

Federal Advisory Committee Inventory
1977–1986



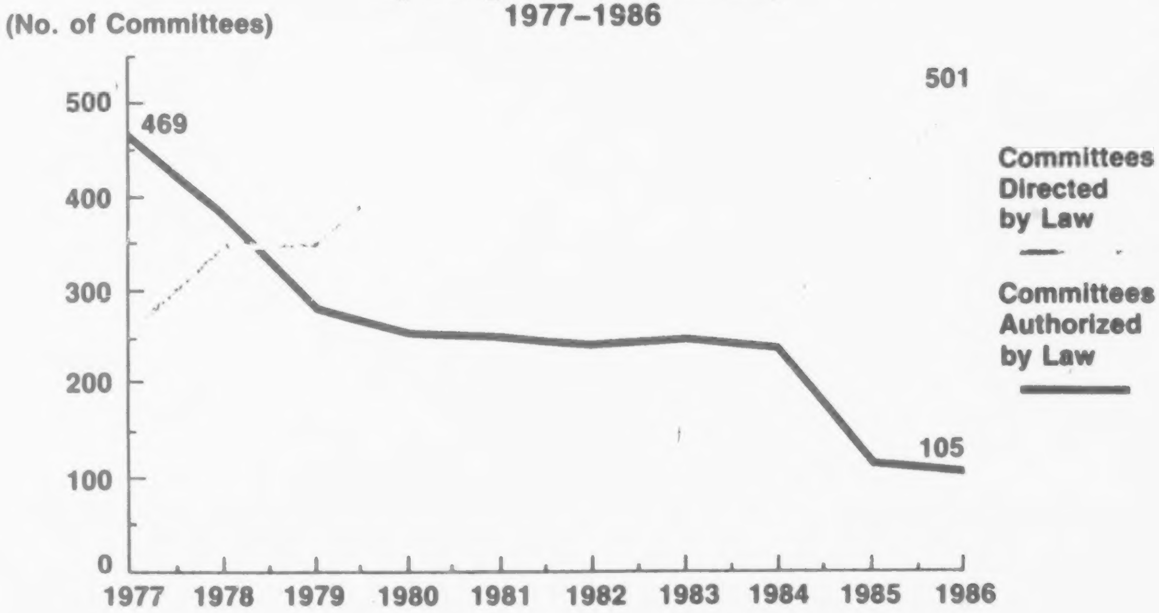
U.S. Senate Committee on Governmental Affairs
Hearings on the Federal Advisory Committee Act (FACA)



Federal Advisory Committees Established
and Terminated
1977–1986

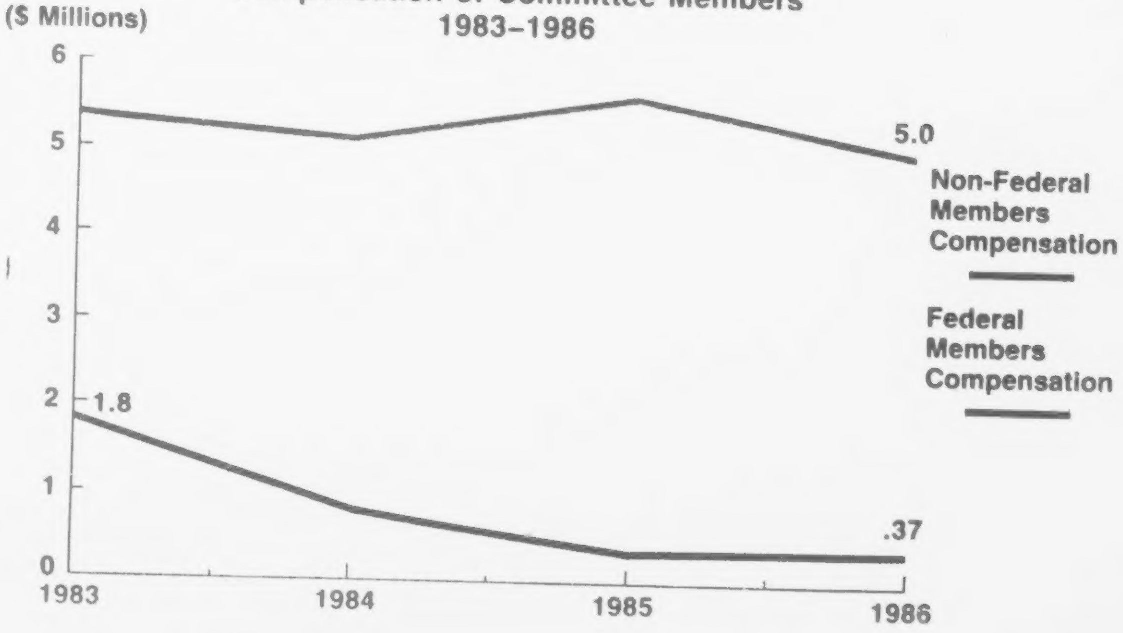
U.S. Senate Committee on Governmental Affairs Hearings on the Federal Advisory Committee Act (FACA)

Federal Advisory Committees Established
by Congressional Authority
1977–1986



U.S. Senate Committee on Governmental Affairs
Hearings on the Federal Advisory Committee Act (FACA)

Compensation of Committee Members
1983–1986



Administrator
General Services Administration
Washington, DC 20405

DRAFT

Dear Mr. Chairman:

As requested by your letter of December 14, 1987, enclosed are the answers to those questions posed by Senator Roth in conjunction with our recent testimony before the Senate Committee on Governmental Affairs. I am also enclosing responses to two questions raised in your letter of October 9, 1987, which have delayed due to the completion of necessary research.

If we may be any further assistance to you, please feel free to contact Mr. James L. Dean, Director of the General Services Administration's Committee Management Secretariat on 523-4884.

Sincerely,

Terence C. Golden

The Honorable
John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, DC 20510-6250

Enclosures

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: In testimony submitted for the record, Philip Harter charges that the process of creating an advisory committee is too cumbersome and, further, that agencies should not have to go through GSA to establish an advisory commission. I have several questions on GSA's role:

A. As a practical matter, does GSA really grant "permission" to an agency to establish and advisory committee; put another way, does GSA have the authority to reject the establishment of advisory committees proposed by the agencies to be established?

B. GSA's principal role in creation is one of consultation. What does GSA do in that process; for example, does it inquire of the proposing agency whether it has determined that the functions to be performed by the proposed advisory committee could not be performed by an existing committee?

C. What exactly has GSA done to streamline the consultation process?

D. What role does GSA play in assisting a new advisory committee - whether agency created or Presidentially created - to get that committee going in terms of office space, furnishings and equipment, and guidance on compliance with the FACA?

E. Is there, by the way, any handbook for advisory committees on how to get started and how to conduct their operations consistent with the FACA; or is such guidance to be provided by the parent agency?

ANSWER: The Federal Advisory Committee Act provides for consultation between GSA and Federal departments and agencies relative to the establishment of advisory committees. The Act, however, does not define the process to be used in fulfilling this responsibility. Accordingly, FACA does not provide GSA with the authority to "veto" an agency's proposal to establish an advisory committee.

ANSWER:
(Continued)

GSA has configured the consultation process as follows:

1. At any point up to and including a formal determination by an agency head that an advisory committee is necessary and in the public interest, GSA works closely with the agency's Committee Management Officer (CMO) to review the proposal for consistency with the provisions of FACA.

2. When a formal proposal for establishing an advisory committee is received by GSA, the Committee Management Secretariat evaluates the Charter for consistency with FACA, and other applicable laws and regulations, and requests comments from the Office of Management and Budget (OMB) and other agencies, if appropriate, to identify instances of possible duplication of effort. GSA also consults its own records for any relevant background materials.

3. Any problems identified during the consultation process are resolved between GSA and the CMO, thus completing the process.

   GSA has not maintained statistics covering the average amount of time required to complete the consultation process required by section 9(a). However, a review of all consultations completed during fiscal year 1987 reveals that, on average, consultations between GSA and Federal agencies took 12.6 calendar days. GSA is sensitive to the need to process consultations expeditiously and has established an internal goal of 10 calendar days to complete such actions. Changes reflected in GSA's Final Rule on Federal advisory committee management and the acquisition of an internal computer support system will assist in achieving this goal.

GSA's Final Rule on Federal advisory committee management provides that agencies proposing advisory committees review their existing groups for instances of possible duplication of effort. The Rule provides that GSA will review proposals for possible duplication between agencies.

ANSWER:
(Continued)

The General Services Administration (GSA) provides a broad range of administrative support to independent Presidential advisory committees on request. When such assistance is requested, it normally consists of payroll processing, accounting, budgeting, personnel, legal, security investigations and other general office support.

Responsibility for providing for the operations of all other committees, including those created under general agency authority, is assigned to the sponsoring organization, unless otherwise provided for by statute or Executive Order.

At the current time there is no single handbook which may be used by all Federal advisory committees in arranging their affairs. While sponsoring organizations are responsible for providing this type of assistance, GSA recognizes that additional efforts are necessary to assure that committees receive adequate guidance. GSA's Interagency Committee on Federal Advisory Committee Management, composed of Federal Committee Management Officers, will be asked to address this requirement in the near future.

QUESTION: A large percentage of advisory committees are authorized or directed by congressional action. Such committees are to terminate after two years unless their duration is otherwise provided by law.

A. In the annual report, how do you account for congressionally-created advisory committees whose duration is not specified in the authorizing legislation after they have been in existence for two years?

B. Does FACA give sufficient guidance and authority to the agencies on when and what basis to terminate advisory committees?

ANSWER: The Annual Report of the President on Federal Advisory Committees does not provide specific data discriminating between congressionally-directed committees having no fixed duration and similar committees which operated under the terms of FACA's two-year sunset provision. Statistical information on all types of committees, which includes the establishment authority, is summarized as provided by the Act.

Other information provided to the Congress as part of GSA's responsibility to conduct an annual comprehensive review of all committees provides more detail on a given group's longevity. This information, which is directed to the Senate Governmental on Governmental Affairs and the House Committee on Government Operations, may be used by the Congress as part of the oversight function envisioned by FACA.

In GSA's opinion, FACA provides sufficient policy guidance on when and how advisory committees should be terminated. However, the task of terminating many committees is complicated by the need to pursue such actions through legislation. GSA has suggested that Congress consider amendments to FACA which would allow termination of statutory committees through administrative action, with appropriate congressional oversight.

QUESTION: Regarding the GSA annual report, besides aggregate numbers, does the report give us any evidence as to the relative quality of the management of advisory committees from one agency to another, for example, the proclivity toward closed meetings, costs versus benefits of committees, and whether the agencies are diligent in terminating advisory committees that have fulfilled their purpose?

ANSWER: The *Annual Report of the President on Federal Advisory Committees* provides a wide range of information relating to the Governmentwide management of Federal advisory committees, including those areas mentioned in your question. The report is transmitted to the Congress in two parts: First, Congress is provided with information on advisory committees at the Governmentwide and agency summary levels. This information is transmitted by the President to the Congress.

Second, GSA provides detailed information on the management of each committee in existence during the fiscal year directly to the Senate and House following transmittal of the President's report. This information is collected pursuant to the Act's requirement for an annual comprehensive review of all committees. This review is designed to provide a basis for evaluating committee activities and the overall performance of Federal departments and agencies in complying with the Act.

Combined, these two elements - which together comprise the annual report - provide a basis for evaluating individual committee and agency performance in complying with FACA.

QUESTION: Mr. Glitzenstein stated in his testimony that the high profile "Blue Ribbon" committees highlight the role that FACA plays. But, don't the many lesser-known committees highlight a different problem; that being assuring the accountability of such committees and terminating them when they are no longer needed?

A. Do the agencies do a good job of weeding out their own committees?

B. Does GSA have enough clout to force such scrutiny in the agencies?

ANSWER: The relative obscurity of many Federal advisory committees does not, in and of itself, pose substantial impediments to their timely termination. One of the most important factors in assuring that unneeded committees are terminated lies in the development and implementation of effective management controls. The Federal Advisory Committee Act provides for the maintenance of such controls.

The relative stability in the total numbers of committees, combined with relatively modest growth in the resources they consume, indicates that past and current efforts to exercise management control have been effective. This does not mean, however, that more cannot be done to enhance the implementation of the Act's intent.

While GSA is committed to controlling the growth and costs associated with committee activities, it also has taken actions to assure that the Government receives maximum benefits for each group created. For example, GSA recently established an Interagency Committee on Federal Advisory Committee Management to provide for a forum to identify and resolve problems relating to compliance with the Act. This group, composed of Committee Management Officers from major departments and agencies, will be involved in efforts to provide Governmentwide training on FACA; devise a desk guide for use by committee staffs in solving problems; provide for improved reporting; and enhance communications.

ANSWER: (Continued)	In GSA's view, the Committee Management Secretariat has sufficient access to the resources required to assure compliance with FACA. The Secretariat interacts with departments and agencies at senior levels and, as required, has the ability to address management issues with other entities, such as the Office of Management and Budget and the President's Council on Management Improvement.

QUESTION: Some questions have been raised about so-called "operational" committees. Some examples of such committees are the Commission on the Bicentennial of the Constitution, the Holocaust Commission, and the Commission on Fine Arts.

A. Aren't these really separate agencies with operational responsibilities, rather than advisory committees, and, if so, is there a need to clarify this point in the FACA?

B. Advisory committees which consider grant applications and make recommendations to the agency on those applications are advisory, not operational, committees, is that correct?

ANSWER: The common use of the terms "committee" and "commission" creates some confusion, particularly on the part of the public, regarding the applicability of the Federal Advisory Committee Act to the operations of many groups. However, with regard to operational committees, such as those cited above, GSA does not believe that amendments to the Act would be effective in enhancing the distinctions between operational and advisory committees.

Operational committees, or groups, are normally created by an Act of Congress to perform a specific function. They share many of the attributes of an agency in that they are normally provided with a budget, have the ability to hire staff and enter into other contractual arrangements, and, in some cases, to obtain resources from the private sector.

The Act's definition of an "advisory committee" is quite broad. In testimony before the Senate, GSA has suggested that Congress consider more precise language. However, as currently worded, the Act is sufficient to provide the basis for determining whether a committee is "operational" or "advisory."

Committees which consider grant applications are advisory only.

QUESTION: Regarding the balanced membership requirement, it seems to me that balance on a particular advisory committee is going to turn upon the functions to be performed by the particular committee. Accordingly, it seems to me that the Act's requirement that the committee be fairly balanced in terms of points of view represented and functions to be performed provides as much guidance as possible given the infinite variety of functions that particular advisory committees might be called upon to carry out. Could you comment on that?

ANSWER: We agree that the balance of a particular committee's membership is intrinsically linked with the group's mission. Accordingly, selection of members is by necessity based upon the expertise required by the sponsoring organization.

In our testimony before the Committee, we have suggested that Congress consider amending the Act to clarify when the balance provision applies to the creation of advisory groups. The Act is clear in its provision that advisory committees be balanced when they are created by statute. The Act is less clear, however, with regard to committees created by departments and agencies and the President.

As a practical matter, it would be quite difficult to develop a workable definition of "balance." Accordingly, in GSA's view the final determination of when adequate balance has been achieved should remain with the establishing authority.

United States Senate
Committee On Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: Section 4(a) of FACA provides that the provision of FACA shall apply to each advisory committee "except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise." From each year from 1980 through the present, please identify by name the statutorily-created committees which were wholly or partly exempted from the requirements of FACA. For those only partially exempted, please identify the requirements from which they were exempted.

[Please note that the following information is based upon GSA's knowledge of those committees which are fully or partially exempt from FACA. GSA may not be aware of all committees which are fully exempt due to the fact that consultation is not required.]

				Exemption From FACA	
Committee	Agency	Statute	Year	Wholly Exempt	Partially Exempt (Section)
Anesthesiology and Respiratory Therapy Devices Panel	HHS/FDA	PL 94-295	1978		14
Circulatory System Devices Panel	HHS/FDA	PL 94-295	1978		14
Clinical Chemistry and Clinical Toxicology Devices Panel	HHS/FDA	PL 94-295	1978		14

Committee	Agency	Statute	Year	Exemption From FACA	
				Wholly Exempt	Partially Exempt (Section)
Dental Devices Panel	HHS/FDA	PL 94-295	1978		14
Device Good Manufacturing Practices Advisory Committee	HHS/FDA	PL 94-295	1978		14
Ear, Nose, and Throat Devices Panel	HHS/FDA	PL 94-295	1978		14
Gastroenterology-Urology Devices Panel	HHS/FDA	PL 94-295	1978		14
General Hospital and Personal Use Devices Panel	HHS/FDA	PL 94-295	1978		14
General and Plastic Surgery Devices Panel	HHS/FDA	PL 94-295	1978		14
Hematology and Pathology Devices Panel	HHS/FDA	PL 94-295	1978		14
Immunology Devices Panel	HHS/FDA	PL 94-295	1978		14
Microbiology Devices Panel	HHS/FDA	PL 94-295	1978		14
Neurological Devices Panel	HHS/FDA	PL 94-295	1978		14
Obstetrics-Gynecology Devices Panel	HHS/FDA	PL 94-295	1978		14

Committee	Agency	Statute	Year	Exemption From FACA	
				Wholly Exempt	Partially Exempt (Section)
Ophthalmic Devices Panel	HHS/FDA	PL 94-295	1978		14
Orthopedic and Rehabilitation Devices Panel	HHS/FDA	PL 94-295	1978		14
Radiologic Devices Panel	HHS/FDA	PL 94-295	1978		14
National Advisory Council on Health Professions Education	HHS/FDA	PL 94-484	1978		14
National Advisory Council on the National Health Services Corps	HHS/FDA	PL 94-484	1978		14
National Earthquake Prediction Evaluation Council	DOI	PL 96-472	1980		10(a)(2)
Joint Council on Food And Agricultural Sciences	USDA	PL 97-098	1981	x	
Fishery Management Councils (24 Cmtes)	DOC	PL 97-453	1983	x	
Cultural Property Advisory Committee	USIA	PL 97-446	1983		10(a)(b), 11

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	 Partially Exempt (Section)
Technical Advisory Committee for Science And Education Research Grants Program	USDA	PL 99-198	1985	x	
Food and Agricultural Sciences National Needs Graduate Fellowships Grant Committee	USDA	PL 99-198	1985	x	
Advisory Board to the U.S. Merchant Marine Academy	DOC	PL 96-453	1980	x	
Chronic Hazard Advisory Panel(s)	CPSC	PL 97-035	1981	x	
Travel and Tourism Advisory Board	DOC	PL 97-063	1981		14
National Driver Register Advisory Committee	DOT	PL 97-364	1982		10(e) (10(f) 14
Code Committee	DOD	PL 98-209	1983	x	
Commission on the Evaluation of Pain	HHS	PL 98-460	1984	x	
Martin Luther King, Jr. Federal Holiday Commission	NA	PL 98-399	1984	x	
National Commission to Prevent Infant Mortality	NA	PL 99-660	1986	x	

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	 Partially Exempt (Section)
Aging Review Committee	HHS/NIH	PL 99-158	1986		14
Allergy and Immunology Study Section	HHS/NIH	PL 99-158	1986		14
Allergy, Immunology and Transplantation Research Committee	HHS/NIH	PL 99-158	1986		14
Animal Resources Review Committee	HHS/NIH	PL 99-158	1986		14
Arthritis, Diabetes and Digestive and Kidney Disease Special Review Committee	HHS/NIH	PL 99-158	1986		14
Bacteriology and Mycology Study Section	HHS/NIH	PL 99-158	1986		14
Behavioral and Neurosciences Study Section	HHS/NIH	PL 99-158	1986		14
Behavioral Medicine Study Section	HHS/NIH	PL 99-158	1986		14
Biochemical Endocrinology Study Section	HHS/NIH	PL 99-158	1986		14
Biochemistry Study Section	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA	
				Wholly Exempt	Partially Exempt (Section)
Biomedical Library Review Committee	HHS/NIH	PL 99-158	1986		14
Biomedical Research Technology Review Committee	HHS/NIH	PL 99-158	1986		14
Biomedical Sciences Study Section	HHS/NIH	PL 99-158	1986		14
Bio-Organic and Natural Products Chemistry Study Section	HHS/NIH	PL 99-158	1986		14
Biophysical Chemistry Study Section	HHS/NIH	PL 99-158	1986		14
Biopsychology Study Section	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Eye Institute	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Heart, Lung and Blood Institute	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	Partially Exempt (Section)
Biomedical Library Review Committee	HHS/NIH	PL 99-158	1986		14
Biomedical Research Technology Review Committee	HHS/NIH	PL 99-158	1986		14
Biomedical Sciences Study Section	HHS/NIH	PL 99-158	1986		14
Bio-Organic and Natural Products Chemistry Study Section	HHS/NIH	PL 99-158	1986		14
Biophysical Chemistry Study Section	HHS/NIH	PL 99-158	1986		14
Biopsychology Study Section	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Eye Institute	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Heart, Lung and Blood Institute	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	 Partially Exempt (Section)
Board of Scientific Counselors, National Institute of Arthritis and Muskoskelatal and Skin Diseases and National Institute of Diabetes and Digestive and Kidney Diseases	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Institute of Allergy and Infectious Diseases	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Institute of Child Health and Human Development	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Institute of Dental Research	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Institute of Environmental Health Sciences	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Institute of Neurological and Communicative Disorders and Stroke	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	 Partially Exempt (Section)
Board of Scientific Counselors, National Institute on Aging	HHS/NIH	PL 99-158	1986		14
Board of Scientific Counselors, National Library of Medicine	HHS/NIH	PL 99-158	1986		14
Cardiovascular and Pulmonary Study Section	HHS/NIH	PL 99-158	1986		14
Cardiovascular and Renal Study Section	HHS/NIH	PL 99-158	1986		14
Cellular and Molecular Basis of Disease Review Committee	HHS/NIH	PL 99-158	1986		14
Cellular Biology and Physiology Study Section	HHS/NIH	PL 99-158	1986		14
Chemical Pathology Study Section	HHS/NIH	PL 99-158	1986		14
Clinical Trials Review Committee	HHS/NIH	PL 99-158	1986		14
Communicative Disorders Review Committee	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	Partially Exempt (Section)
Diagnostic Radiology Study Section	HHS/NIH	PL 99-158	1986		14
Endocrinology Study Section	HHS/NIH	PL 99-158	1986		14
Environmental Health Sciences Review Committtee	HHS/NIH	PL 99-158	1986		14
Epidemiology and Disease Control Study Section	HHS/NIH	PL 99-158	1986		14
Experimental Cardiovascular Sciences Study Section	HHS/NIH	PL 99-158	1986		14
Experimental Immunology Study Section	HHS/NIH	PL 99-158	1986		14
Experimental Therapeutics Study Section	HHS/NIH	PL 99-158	1986		14
General Clinical Research Centers Committee	HHS/NIH	PL 99-158	1986		14
General Medicine A Study Section	HHS/NIH	PL 99-158	1986		14
General Medicine B Study Section	HHS/NIH	PL 99-158	1986		14
General Research Support Review Committee	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	Exemption From FACA Partially Exempt (Section)
Diagnostic Radiology Study Section	HHS/NIH	PL 99-158	1986		14
Endocrinology Study Section	HHS/NIH	PL 99-158	1986		14
Environmental Health Sciences Review Committtee	HHS/NIH	PL 99-158	1986		14
Epidemiology and Disease Control Study Section	HHS/NIH	PL 99-158	1986		14
Experimental Cardiovascular Sciences Study Section	HHS/NIH	PL 99-158	1986		14
Experimental Immunology Study Section	HHS/NIH	PL 99-158	1986		14
Experimental Therapeutics Study Section	HHS/NIH	PL 99-158	1986		14
General Clinical Research Centers Committee	HHS/NIH	PL 99-158	1986		14
General Medicine A Study Section	HHS/NIH	PL 99-158	1986		14
General Medicine B Study Section	HHS/NIH	PL 99-158	1986		14
General Research Support Review Committee	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	Exemption From FACA Partially Exempt (Section)
Genetic Basis of Disease Review Committee	HHS/NIH	PL 99-158	1986		14
Geriatrics Review Committee	HHS/NIH	PL 99-158	1986		14
Hearing Research Study Section	HHS/NIH	PL 99-158	1986		14
Heart, Lung and Blood Research Committee A	HHS/NIH	PL 99-158	1986		14
Heart, Lung and Blood Research Committee B	HHS/NIH	PL 99-158	1986		14
Hematology Study Section	HHS/NIH	PL 99-158	1986		14
Human Development and Aging Study Section	HHS/NIH	PL 99-158	1986		14
Human Embryology and Development Study Section	HHS/NIH	PL 99-158	1986		14
Immunobiology Study Section	HHS/NIH	PL 99-158	1986		14
Mammaliam Genetics Study Section	HHS/NIH	PL 99-158	1986		14
Maternal and Child Health Research Committee	HHS/NIH	PL 99-158	1986		14
Medicinal Chemistry Study Section	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	 Partially Exempt (Section)
Mental Retardation Research Committee	HHS/NIH	PL 99-158	1986		14
Metabolism Study Section	HHS/NIH	PL 99-158	1986		14
Metallobiochemistry Study Section	HHS/NIH	PL 99-158	1986		14
Microbial Physiology and Genetics Study Section	HHS/NIH	PL 99-158	1986		14
Microbiology and Infectious Diseases Research Committee	HHS/NIH	PL 99-158	1986		14
Minority Access to Research Careers (MARC) Review Committee	HHS/NIH	PL 99-158	1986		14
Molecular and Cellular Biophysics Study Section	HHS/NIH	PL 99-158	1986		14
Molecular Biology Study Section	HHS/NIH	PL 99-158	1986		14
Molecular Cytology Study Section	HHS/NIH	PL 99-158	1986		14
National Institute of Dental Research Special Grants Review Committee	HHS/NIH	PL 99-158	1986		14
Neurological Disorders Program-Project Review A Committee	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	Exemption From FACA Partially Exempt (Section)
Neurological Disorders Program-Project Review B Committee	HHS/NIH	PL 99-158	1986		14
Neurological Sciences Study Section	HHS/NIH	PL 99-158	1986		14
Neurology A Study Section	HHS/NIH	PL 99-158	1986		14
Neurology B Study Section	HHS/NIH	PL 99-158	1986		14
Neurology C Study Section	HHS/NIH	PL 99-158	1986		14
Nutrition Study Section	HHS/NIH	PL 99-158	1986		14
Oral Biology and Medicine Study Section	HHS/NIH	PL 99-158	1986		14
Orthopedics and Musculoskelatal Study Section	HHS/NIH	PL 99-158	1986		14
Pathobiochemistry Study Section	HHS/NIH	PL 99-158	1986		14
Pathology A Study Section	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	 Partially Exempt (Section)
Pathology B Study Section	HHS/NIH	PL 99-158	1986		14
Pharmacological Sciences Review Committee	HHS/NIH	PL 99-158	1986		14
Pharmacology Study Section	HHS/NIH	PL 99-158	1986		14
Physical Biochemistry Study Section	HHS/NIH	PL 99-158	1986		14
Physiological Chemistry Study Section	HHS/NIH	PL 99-158	1986		14
Physiology Study Section	HHS/NIH	PL 99-158	1986		14
Population Research Committee	HHS/NIH	PL 99-158	1986		14
Radiation Study Section	HHS/NIH	PL 99-158	1986		14
Reproductive Biology Study Section	HHS/NIH	PL 99-158	1986		14
Reproductive Endocrinology Study Section	HHS/NIH	PL 99-158	1986		14
Research Manpower Review Committee	HHS/NIH	PL 99-158	1986		14
Respiratory and Applied Physiology Study Section	HHS/NIH	PL 99-158	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	 Partially Exempt (Section)
Sensory Disorders and Language Study Section	HHS/NIH	PL 99-158	1986		14
Social Sciences and Population Study Section	HHS/NIH	PL 99-158	1986		14
Surgery and Bio-engineering Study Section	HHS/NIH	PL 99-158	1986		14
Surgery, Anesthesiology and Trauma Study Section	HHS/NIH	PL 99-158	1986		14
Toxicology Study Section	HHS/NIH	PL 99-158	1986		14
Tropical Medicine and Parisitology Study Section	HHS/NIH	PL 99-158	1986		14
Virology Study Section	HHS/NIH	PL 99-158	1986		14
Vision Research Review Committee	HHS/NIH	PL 99-158	1986		14
Visual Sciences A Study Section	HHS/NIH	PL 99-158	1986		14
Visual Sciences B Study Section	HHS/NIH	PL 99-158	1986		14
Alcohol Biomedical Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Alcohol Psychosocial Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14

Committee	Agency	Statute	Year	Exemption From FACA	
				Wholly Exempt	Partially Exempt (Section)
Basic Behavioral Processes Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Board of Scientific Counselors, National Institute on Alcohol Abuse and Alcoholism	HHS/ADAMHA	PL 99-570	1986		14
Board of Scientific Counselors, National Institute on Drug Abuse	HHS/ADAMHA	PL 99-570	1986		14
Board of Scientific Counselors, National Institute of Mental Health	HHS/ADAMHA	PL 99-570	1986		14
Cognition, Emotion, and Personality Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Criminal and Violent Behavior Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Drug Abuse Biomedical Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Drug Abuse Clinical and Behavioral Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14

Committee	Agency	Statute	Year	Exemption From FACA	
				Wholly Exempt	Partially Exempt (Section)
Drug Abuse Epidemiology, Prevention, and Services Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Epidemiologic and Services Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Life Course and Prevention Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Mental Health Behavioral Sciences Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Mental Health Research Education Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Mental Health Small Grant, Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Neurosciences Research Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Psychopathology and Clinical Biology Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14

Committee	Agency	Statute	Year	Exemption From FACA Wholly Exempt	Exemption From FACA Partially Exempt (Section)
Research Scientist Development Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Treatment Development and Assessment Research Review Committee	HHS/ADAMHA	PL 99-570	1986		14
Trade Committees	USTR (4) USDA (9) DOC (21) DOD (1) DOL (1)	PL 93-618	1974		10(a), 10(b), 11

United States Senate
Committee on Governmental Affairs
Hearings On The Governmentwide Implementation Of The
Federal Advisory Committee Act

QUESTION: Section 5(b) of FACA requires Congress to provide for certain items in each piece of legislation establishing or authorizing the establishment of any advisory committee (set forth in subparagraphs 1-5). For those statutorily-created committees currently in existence, please provide statistical and other information which will show how well Congress has complied with this requirement.

			FACA 5(b) Requirements				
Committee	Agency	Statute	Purpose	Balance	Impartiality	Operations	Staff
Advisory Committee on Swine Health Protection	USDA	PL 96-468	x	x			
Federal Grain Inspection Service Advisory Committee	USDA	PL 97-035	x	x	x	x	x
Mono Basin National Scenic Advisory Board	USDA	PL 98-425	x	x		x	
Mount St. Helens Scientific Advisory Board	USDA	PL 97-243	x	x			
National Advisory Committee for Tobacco Inspection Services	USDA	PL 97-035*	x				

Committee	Agency	Statute	FACA 5(b) Requirements				
			Purpose	Balance	Impartiality	Operations	Staff
National Agricultural Cost of Production Standards Review Board	USDA	PL 97-098	x	x		x	x
Federal Coal Export Commission	DOC	PL 99-083	x	x		x	
National Industrial Technology Board	DOC	PL 96-480	x	x		x	x
Travel and Tourism Advisory Board	DOC	PL 97-063	x	x		x	x
Defense Retirement Board of Actuaries	DOD	PL 98-044	x	x			
Energy Research Advisory Board, Technical Panel on Magnetic Fusion	DOE	PL 96-386	x	x			
Council on Graduate Medical Education	HHS	PL 99-272	x	x		x	x
Disability Advisory Council	HHS	PL 99-272	x	x			
Interagency Committee on Smoking and Health	HHS	PL 98-474	x	x		x	x

Committee	Agency	Statute	FACA 5(b) Requirements				
			Purpose	Balance	Impartiality	Operations	Staff
National Advisory Council on Health Care Technology Assessment	HHS	PL 98-551	x	x		x	x
National Center for Nursing Research Advisory Council	HHS	PL 99-158	x	x		x	x
National Commission on Orphan Diseases	HHS	PL 99-091	x	x	x	x	x
National Kidney and Urologic Diseases Advisory Board	HHS	PL 99-158	x	x	x	x	x
Task Force on Long-Term Health Care Policies	HHS	PL 99-272	x	x			
Task Force on Technology Dependent Children	HHS	PL 99-272	x	x			
Alaska Land Use Council	DOI	PL 96-487	x	x		x	x
Chattahoochee River National Recreation Area Advisory Commission	DOI	PL 98-568	x	x			

Committee	Agency	Statute	FACA 5(b) Requirements				
			Purpose	Balance	Impartiality	Operations	Staff
Jefferson National Expansion Memorial Committee	DOI	PL 98-398	x	x		x	x
Trinity River Basin Fish and Wildlife Task Force	DOI	PL 98-541	x	x			
Advisory Board on Missing Children	DOJ	PL 98-473	x	x			
National Conference of Member Representatives From State Advisory Groups	DOJ	PL 98-473	x				
Soviet-Eastern European Studies Advisory Committee	DOS	PL 98-164	x	x		x	x
Commercial Motor Vehicle Safety Regulatory Review Committee	DOT	PL 98-554	x	x		x	x
National Driver Register Advisory Committee	DOT	PL 97-364	x	x		x	x
Rules of the Road Advisory Council	DOT	PL 96-591	x	x		x	x
Customs User Fees Advisory Committee	TRES	PL 99-272	x	x			

Committee	Agency	Statute	FACA 5(b) Requirements Purpose	Balance	Impartiality	Operations	Staff
Technical Study Group on Cigarette and Little Cigar Fire Safety	CPSC	PL 98-567	x	x		x	
Committee on Equal Opportunities in Science and Engineering	NSF	PL 96-516	x	x			
Computer Security and Education Advisory Council	SBA	PL 98-362	x	x			
National Small Business Center Advisory Board	SBA	PL 96-302	x	x			
Cultural Property Advisory Committee	USIA	PL 97-446	x	x		x	x
Advisory Committee on Native American Veterans	VA	PL 99-272	x	x			
Geriatrics and Gerontology Advisory Committee	VA	PL 96-330	x	x		x	x
Veterans' Advisory Committee on Environmental Hazards	VA	PL 98-542	x	x		x	x
Veterans Advisory Committee on Rehabilitation	VA	PL 96-466	x	x		x	

Note: The following entries deal with legislation which directs the establishment of multiple committees. In total, these entries cover 288 committees in 8 agencies.

Committee	Agency	Statute	FACA 5(b) Requirements Purpose	Balance	Impartiality	Operations	Staff
Trade Committees	USTR (4) USDA (9) DOC (21) DOD (1) DOL (1)	PL 93-618	x	x		x	x
Technical Advisory Committees	DOC (9)	PL 96-072	x	x		x	
Medical Device Panels	HHS/FDA (17)	PL 94-295	x	x		x	x
Medical Peer Review Committees	HHS/NIH (103)	PL 99-158	x			x	x
Medical Peer Review Committees	HHS/ADAMHA (20)	PL 99-570	x	x		x	
District Advisory Councils	DOI/BLM (52)	PL 94-579	x	x		x	
Civil Rights State Advisory Committees	CCR (51)	PL 95-444	x	x		x	x

UNITED STATES CODE

Title 5

Government Organization and Employees

APPENDIX 2

FEDERAL ADVISORY COMMITTEE ACT

Pub.L. 92–463, Oct. 6, 1972, 36 Stat. 770, as amended Pub.L. 94–409, § 5(c), Sept. 13, 1976, 90 Stat. 1247; 1977 Reorg. Plan No. 1, § 5F, 42 F.R. 56101, 91 Stat. 1634; Pub.L. 96–523, § 2, Dec. 12, 1980, 94 Stat. 3040; Pub.L. 97–375, Title II, § 201(c), Dec. 21, 1982, 96 Stat. 1822.

Sec.
1. Short title.
2. Findings and purpose.
3. Definitions.
4. Applicability; restrictions.
5. Responsibilities of Congressional committees; review; guidelines.
6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion.
7. Responsibilities of the Director, Office of Management and Budget; Committee Managment Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations.
8. Responsibilities of agency heads; Advisory Committee Management Officer, designation.
9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy.
10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance.
11. Availability of transcripts; "agency proceeding".
12. Fiscal and administrative provisions; recordkeeping; audit; agency support services.
13. Responsibilities of Library of Congress; reports and background papers; depository.
14. Termination of advisory committees; renewal; continuation.
15. Effective date.

§ 1. Short title

This Act may be cited as the "Federal Advisory Committee Act".

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§ 3. Definitions

For the purpose of this Act—

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of Title 5.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§ 4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

§ 5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

§ 6. Responsibilities of the President: report to Congress: annual report to Congress: exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

§ 7. Responsibilities of the Administrator of General Services: Committee Management Secretariat, establishment: review: recommendations to President and Congress: agency cooperation: performance guidelines: uniform pay guidelines: travel expenses: expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether is should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS–18 of the General Schedule under section 5332 of title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members—

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of Title 5, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such Title 5),

may be provided services pursuant to section 3102 of such Title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent—

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

§ 8. Responsibilities of agency heads: Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

§ 11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

§ 12. Fiscal and administrative provisions; recordkeeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

§ 13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

§ 14. Termination of advisory committees; renewal; continuation

(a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

§ 15. Effective date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following October 6, 1972.

DESCRIPTIONS OF CHARTS

CHART 1 TOTAL COST FOR ADVISORY COMMITTEES IN NOMINAL DOLLARS
This chart shows the cost, in millions, for all advisory committees from 1972-1986. These figures are not adjusted for inflation, so much of the increase from 1972 through 1980 can be attributed to the steep inflation which was prevalent then.

CHART 2 TOTAL COST FOR ADVISORY COMMITTEES IN REAL (1972) DOLLARS
A large difference is immediately apparent between CHART I and CHART II. Costs do not rise as steeply or as much, with the highest year (1979) costing $88 million in nominal dollars, but only $51 million in constant, real (1972) dollars, because these figures have been adjusted for inflation. Total costs peaked in 1979 and fell after that until 1983.

CHART 3 TOTAL NUMBER OF ADVISORY COMMITTEES
There are two sets of similar levels of advisory committees, one running from 1972-1977, and the other from 1978-86. The decrease is accounted for by the "zero-based" review undertaken by President Carter in 1977.

CHART 4 AVERAGE REAL COST OF EACH COMMITTEE IN 1972 DOLLARS
This chart shows the cost of each committee, in real (1972) dollars. This is essentially a combination of CHARTS 2 and 3. It allows us to compare the relative average cost of a committee in a given year.

CHART 5 TOTAL NUMBER OF MEETINGS
The total number of meetings per year is fairly constant, with a peak in 1976, a decrease until 1982, an increase until 1985, and drop in 1986. Although this is useful in that it shows us the scope of advisory committee meetings, a more useful chart is that of the number of meetings per committee.

CHART 6 AVERAGE NUMBER OF MEETINGS PER COMMITTEE
This chart shows a definite increase in the numbers of meetings each Committee held from 1974 through 1979. This trend could either reflect a genuine increase in productivity (as measured by the number of meetings held by each committee) or just an elimination of defunct committees which hold no meetings. The latter case would explain the peak in 1979, which is the year with the fewest number of committees.

CHART 7 AVERAGE REAL COST OF EACH MEETING IN 1972 DOLLARS
This chart shows a peak in cost per meeting in 1979, and then a decrease until 1985. Since the number of meetings per committee was fairly constant from 1980-86 (see CHART 6) one conclusion is that the average cost per meeting has decreased substantially from $12,153 in 1979 to $8,917 in 1986.

CHART 8 TOTAL NUMBER OF REPORTS ISSUED
Another measure of Committee productivity is the number of reports issued. This chart shows the trend in total reports issued. The sharp decrease after 1979 is partially reflective of the drop in the number of advisory committees, but to understand this more clearly we need to examine the number of reports issued per Committee.

CHART 9 AVERAGE NUMBER OF REPORTS PER COMMITTEE
This chart shows that the number of reports issued per Committee has stayed fairly close to 0.75 reports per Committee per year before 1980 -- the increase in 1980 and 81 to 1.14 reports per year is difficult to explain. The decrease in number of reports from 1.14 in 1981 to only 0.67 in 1986 is also difficult to explain.

CHART 10 AVERAGE REAL COST OF EACH REPORT IN 1972 DOLLARS
Another measure of value received from advisory committees is the cost per report. Although the cost per report varies between $35,526 in 1974 and $47,570 in 1979, it is difficult to draw any conclusions from this. One reason for the jump might be the number of "policy" committees, which GSA says are much more "resource intensive" than most committees. The number of these committees has more than doubled from 1984 and 1986 (the only years for which we have this information), from 35 to 74, which could explain the increase in cost per report in those years.

CHART 11 TOTAL NUMBER OF MEMBERS
One of the most important features of FACA is its involvement of private citizens in the Government decision-making process. This chart shows the total number of individuals involved as members of advisory committees each year, in thousands. Again, the chart of members per committee will give us a more exact sense of the extent of involvement of the public as members of advisory committees.

CHART 12 AVERAGE NUMBER OF MEMBERS PER COMMITTEE
This chart shows a very clear trend towards advisory committees with more members in recent years.

CHART 13 AVERAGE REAL COST OF EACH MEMBER IN 1972 DOLLARS
This chart shows that the real cost per member has dropped significantly after 1979. This could show that the government return for its advisory committee dollar is increasing -- it gets more input from a wider variety of views for each dollar spent.

CHART 14 NUMBER OF MEMBERS PER REPORT

This chart shows that it took far more members in 1986 to produce one report than it did in, say, 1979. However, since the cost per member has decreased, the cost per report has fluctuated fairly randomly, and the number of reports per committee has stayed fairly constant, we can see that each report has had more members contributing to it while not costing significantly more.

CHART 15 TYPE OF COMMITTEE -- CONTINUING OR AD HOC

This chart reflects both the total number of committees and the type of committee. A continuing committee is a "standing" committee established by Congress, an agency head, or the President to provide advice on a general area on an ongoing basis, while an ad hoc committee is formed to solve a specific problem and terminates after this report is issued. The tremendous difference between the two is indicative of the fact that the Government creates and utilizes far more continuing committees than ad hoc.

CHART 16 COMMITTEE AUTHORIZATION

This chart shows that the source of the large decrease in advisory committees between 1977 and 1979 is due to the decrease in agency-created committees (see CHART 3). Congressionally created and Presidentially created committees have stayed fairly constant, although there is a slight decrease in the former from 1980-1986. This suggests that Congress may be more at fault than anyone else for creating committees and allowing them to stand long after their function has been completed. This is a frequently heard criticism of Congressionally created advisory committees, since they can only be abolished by statute or a statutory amendment.

CHART 17 TYPE OF MEETING

This chart shows the distribution of open, closed, and partially open meetings. Although levels of mixed and closed meetings stay fairly stable, the trend towards fewer open meetings from 1980-1986 shows that a larger percentage of all meetings are now closed or partially closed.

CHART 18 PERCENT OF OPEN, CLOSED, AND MIXED MEETINGS

This chart, a modification of CHART 17, shows the percent of the total number of meetings which are open, closed, or partially closed (mixed). The percent of open meetings decreases quite substantially after 1980, from 62% to only 48% in 1986, as both the percentages of closed and partially closed meetings rises.

CHART 1

TOTAL COST FOR ADVISORY COMMITTEES IN NOMINAL DOLLARS

in millions

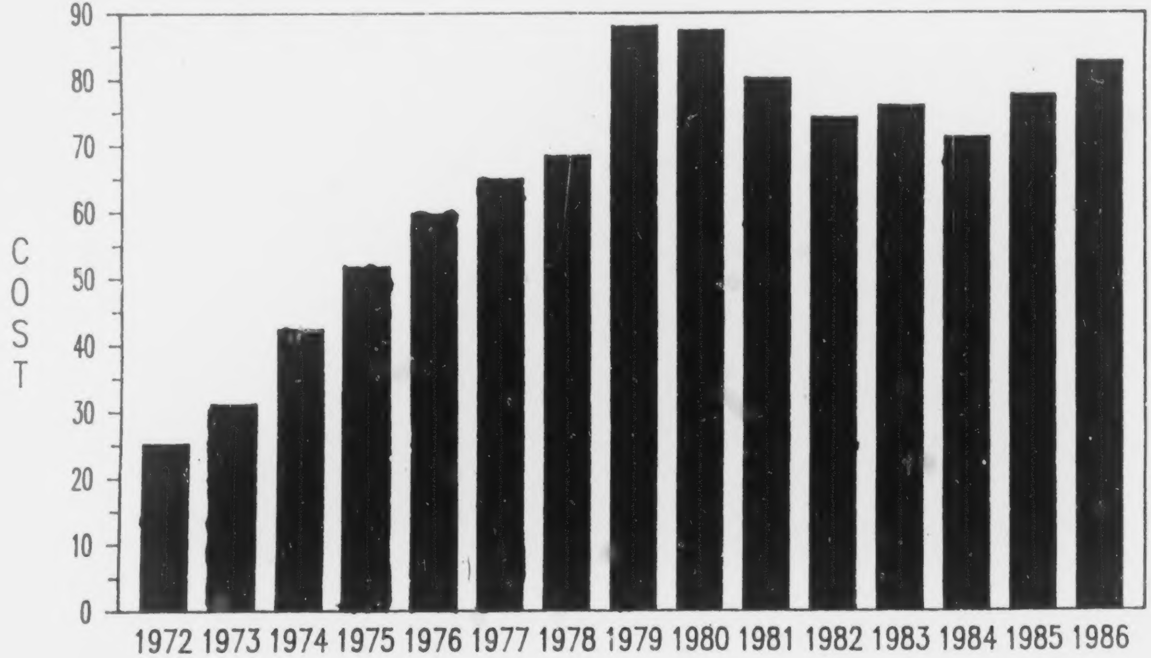


CHART 2

TOTAL COST FOR ADVISORY COMMITTEES IN REAL (1972) DOLLARS

in millions

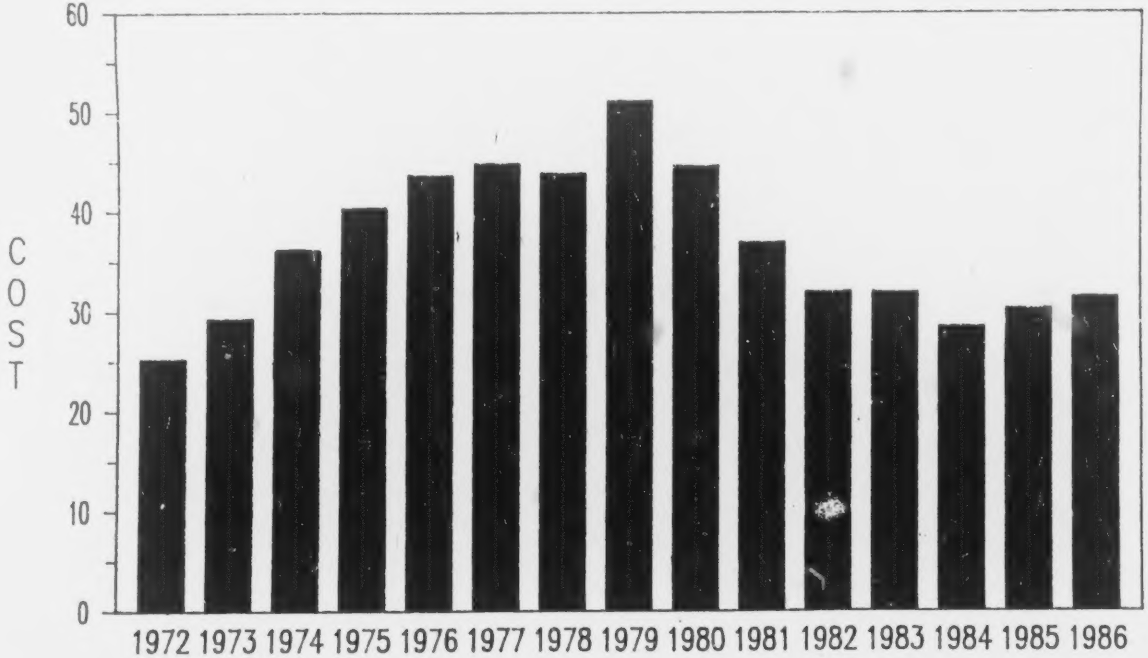
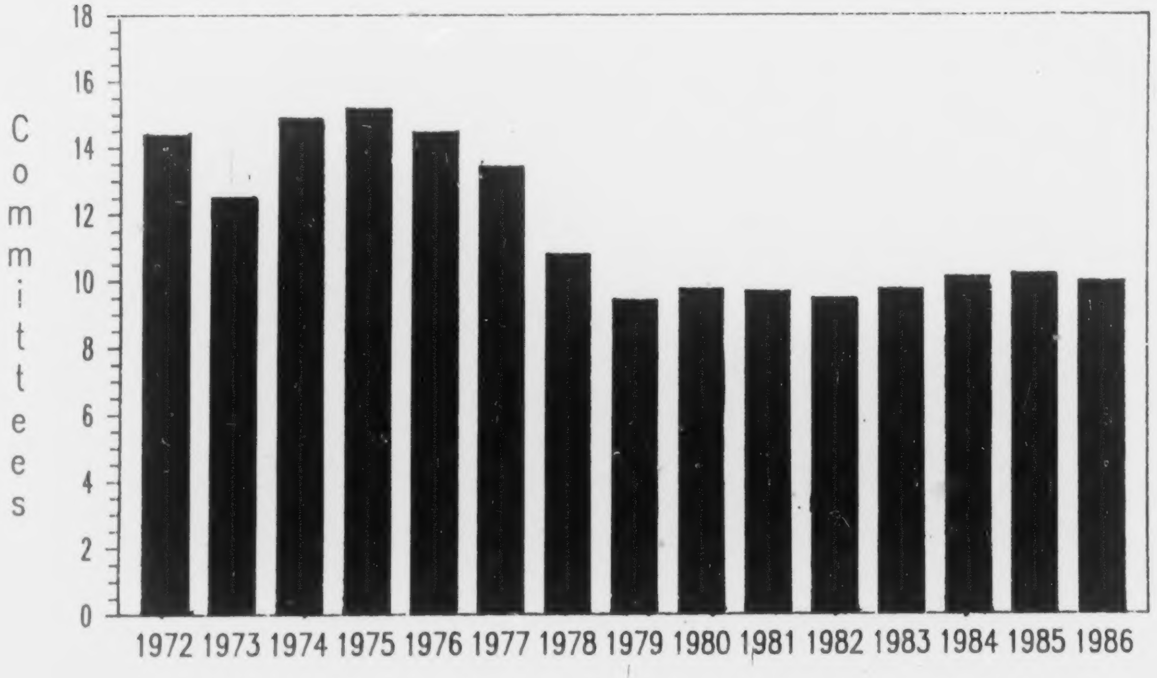


CHART 3

TOTAL NUMBER OF ADVISORY COMMITTEES

in hundreds



CHAR. 4

AVERAGE REAL COST OF EACH COMMITTEE in 1972 dollars
in thousands

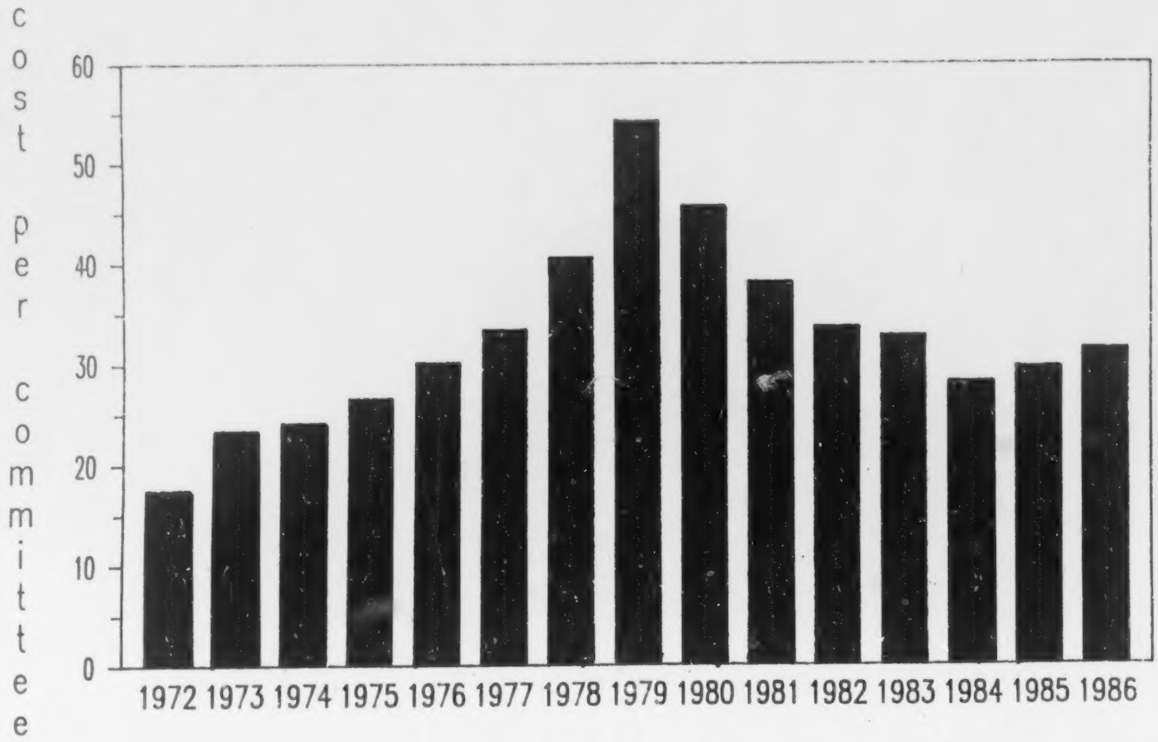


CHART 5

TOTAL NUMBER OF MEETINGS

in thousands

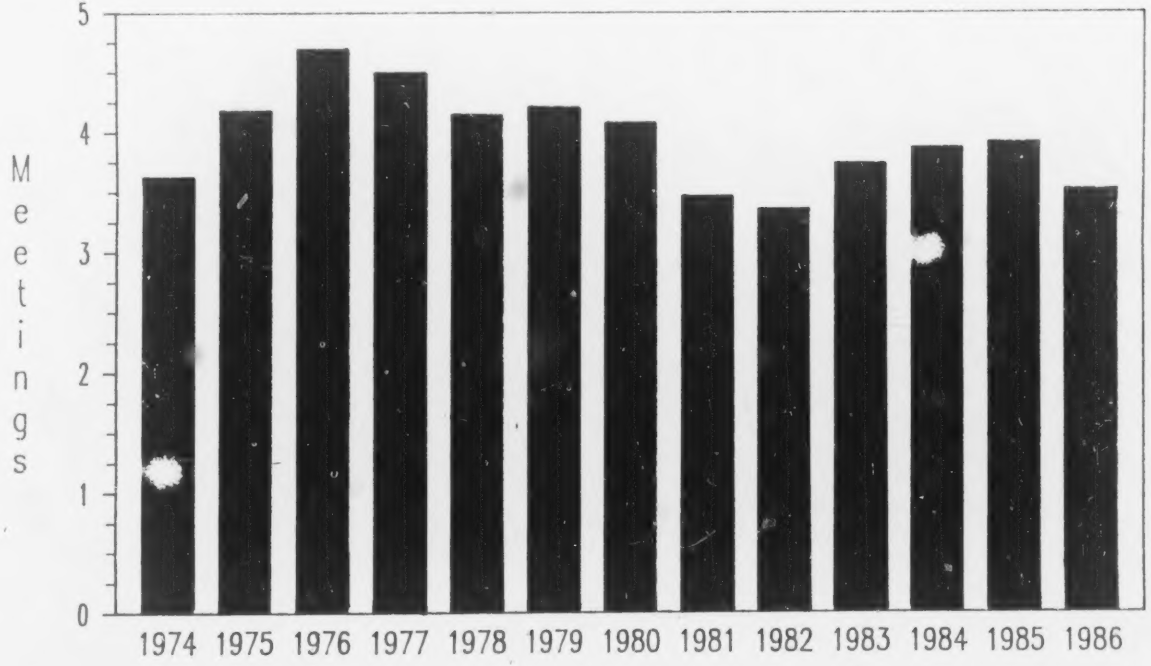


CHART 16

AVERAGE NUMBER OF MEETINGS PER COMMITTEE

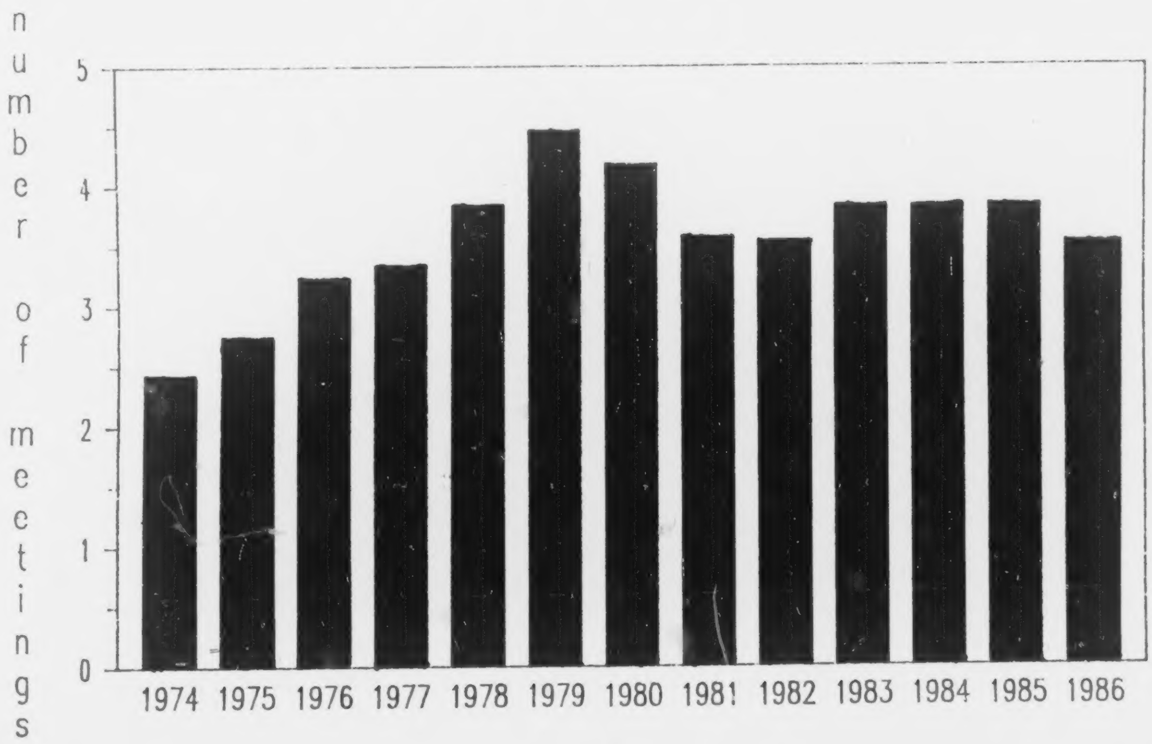


CHART 7

AVERAGE REAL COST OF EACH MEETING in 1972 dollars
in thousands

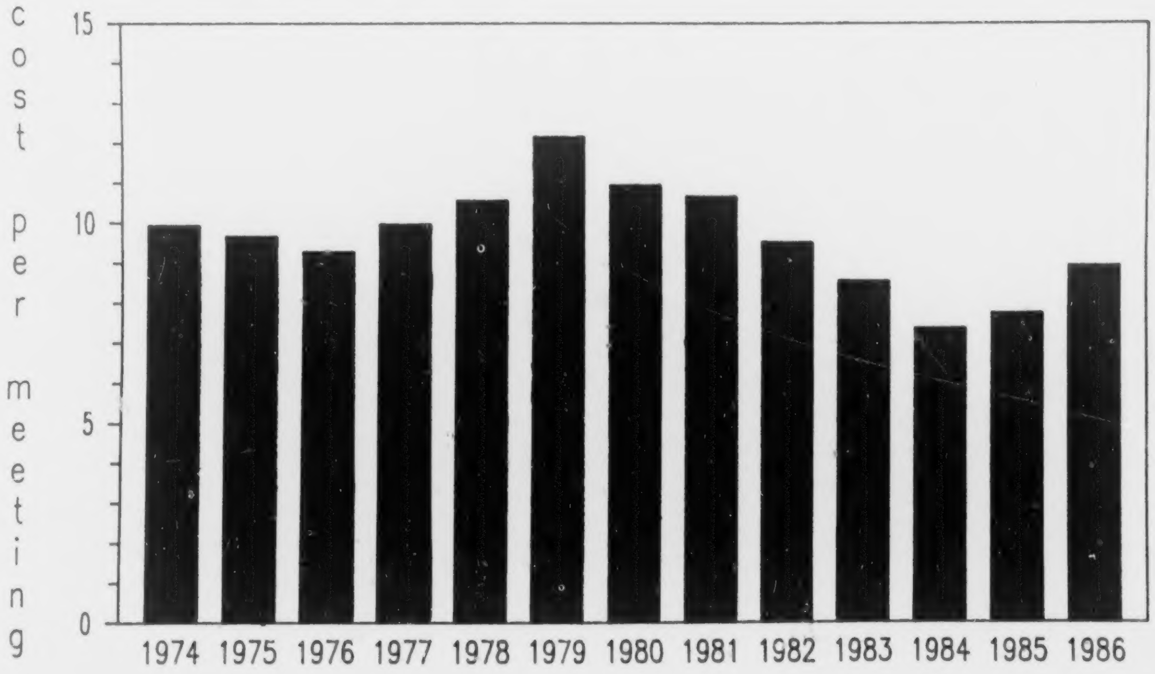


CHART 8

TOTAL NUMBER OF REPORTS ISSUED

in hundreds

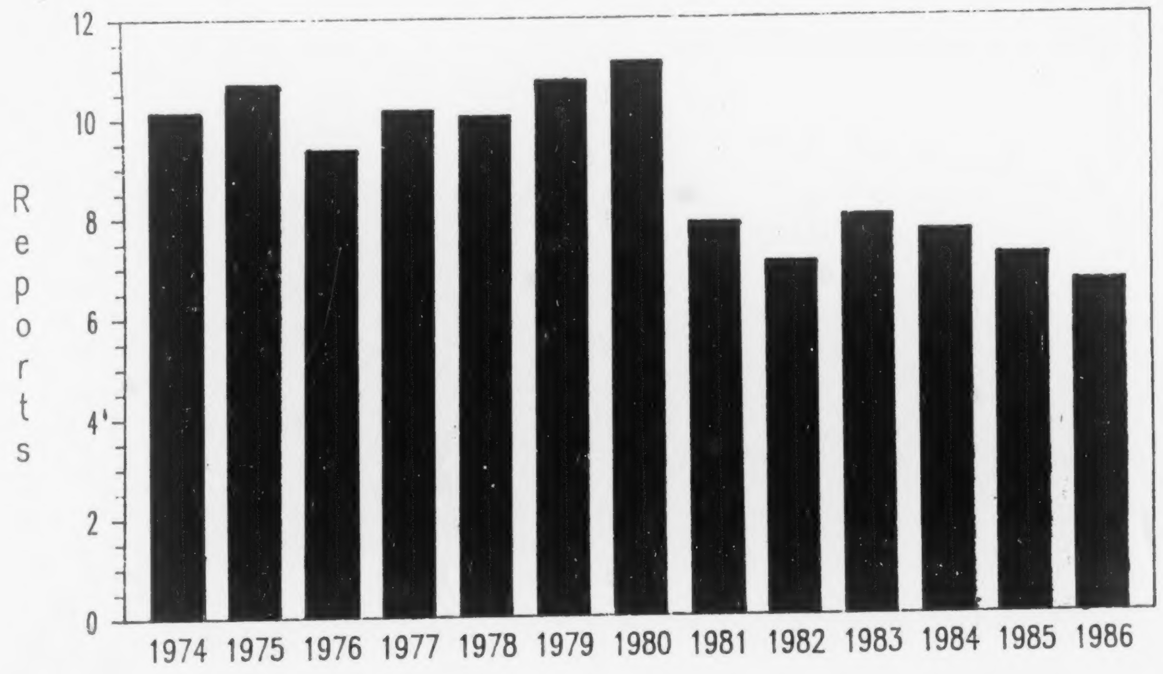


CHART 9

AVERAGE NUMBER OF REPORTS PER COMMITTEE

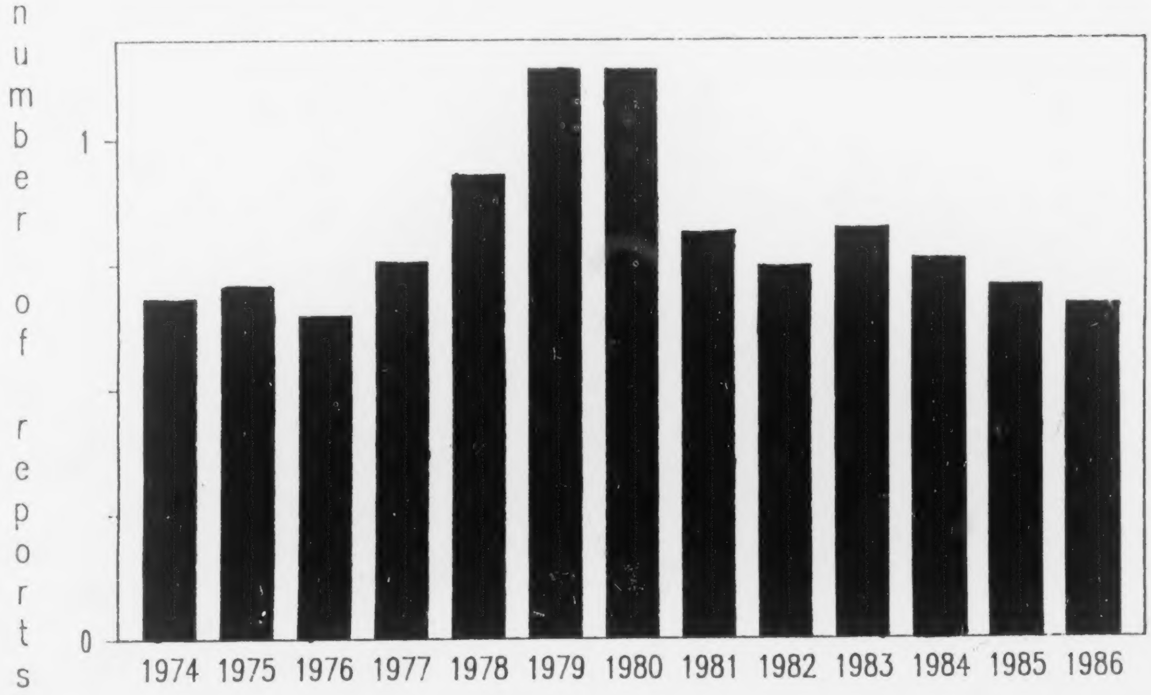


CHART 10

AVERAGE REAL COST OF EACH REPORT in 1972 dollars
in thousands

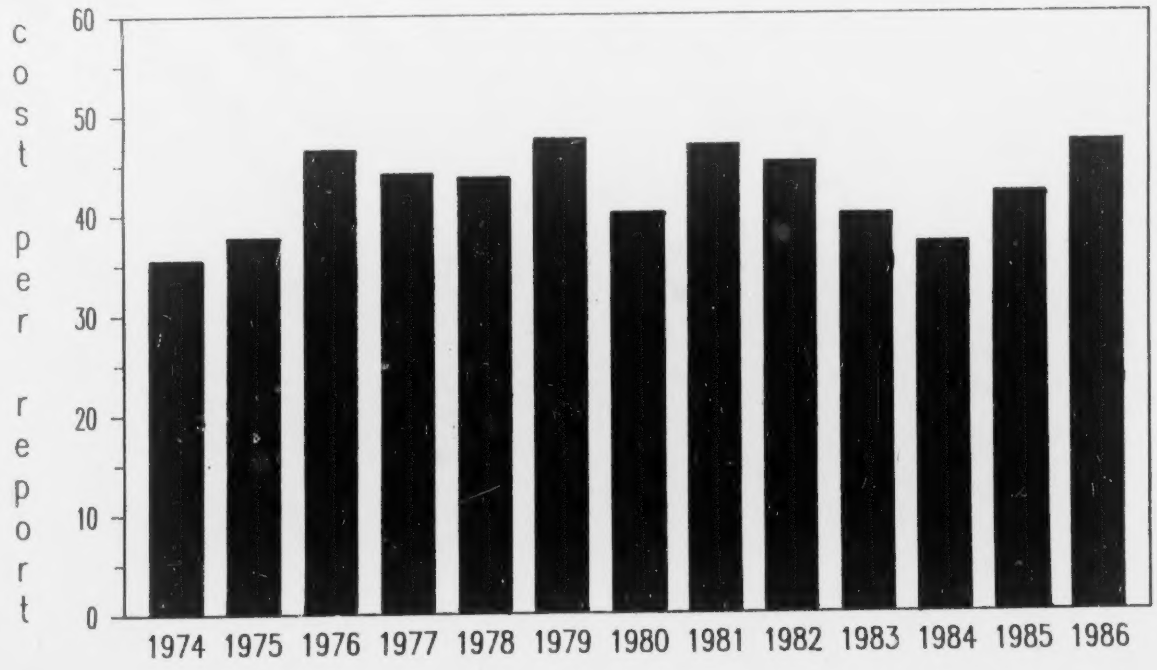


CHART 11

TOTAL NUMBER OF MEMBERS

in thousands

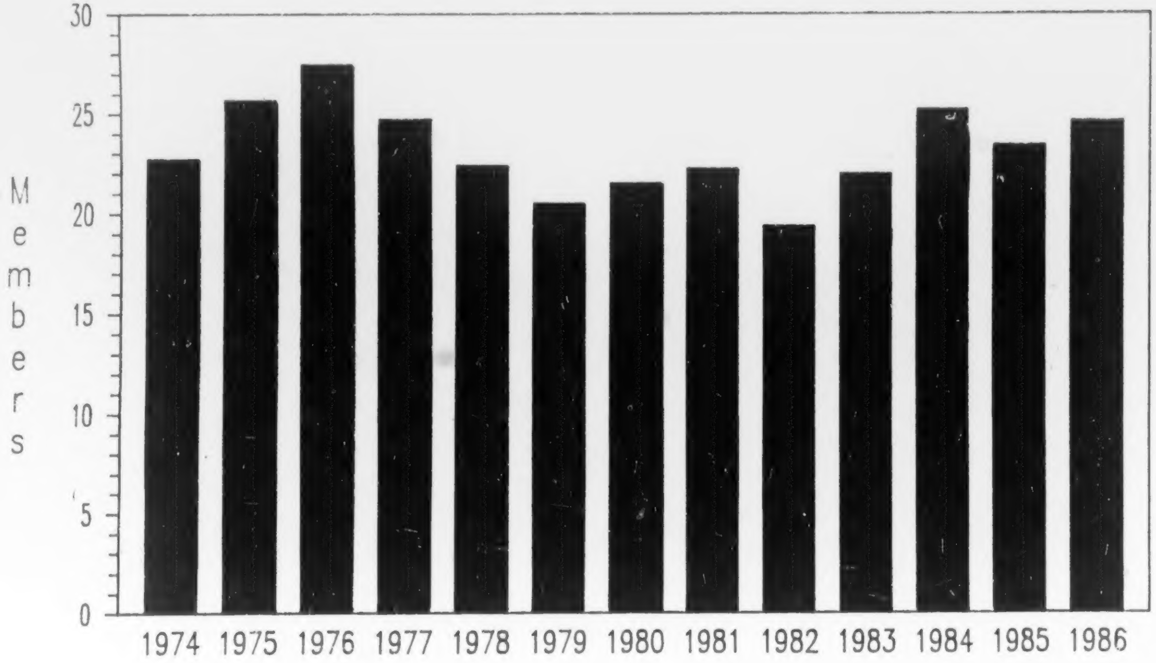


CHART 12

AVERAGE NUMBER OF MEMBERS PER COMMITTEE

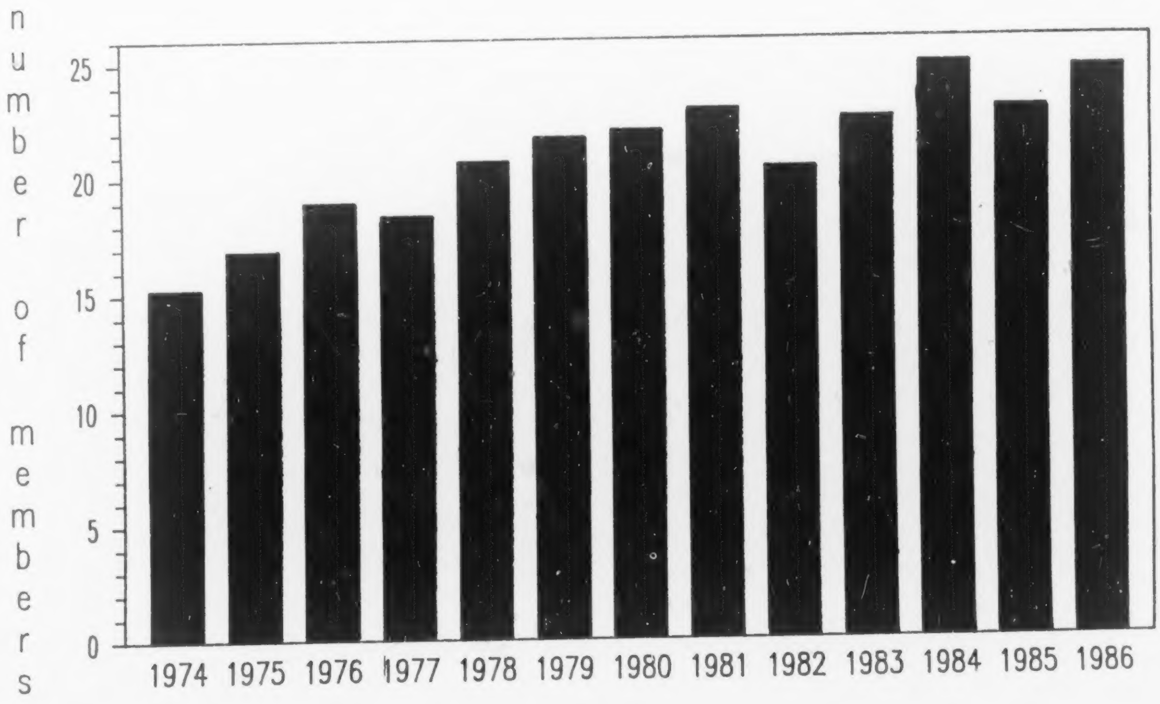


CHART 13

AVERAGE REAL COST OF EACH MEMBER in 1972 dollars
in thousands

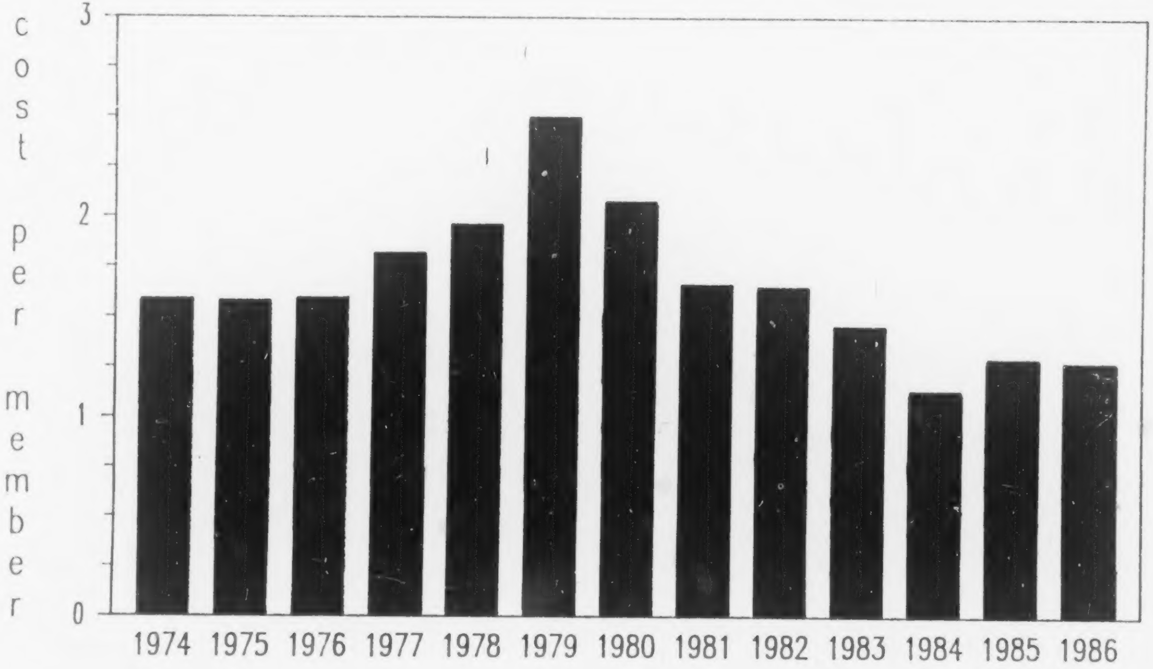


CHART 14

NUMBER OF MEMBERS PER REPORT

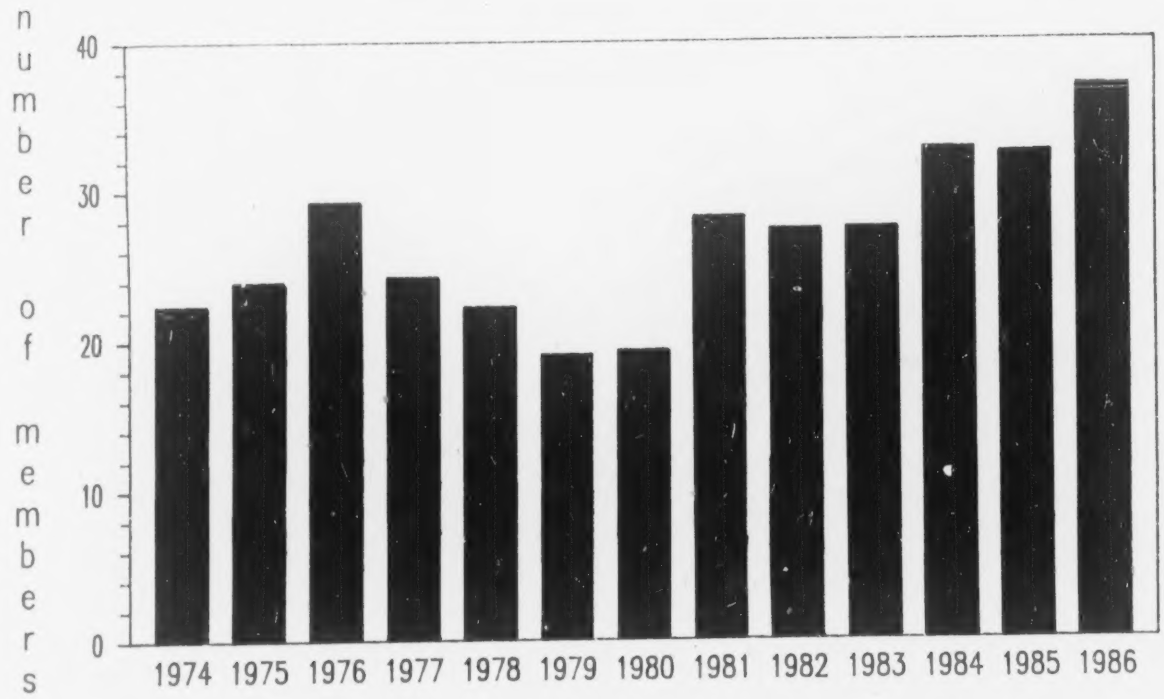
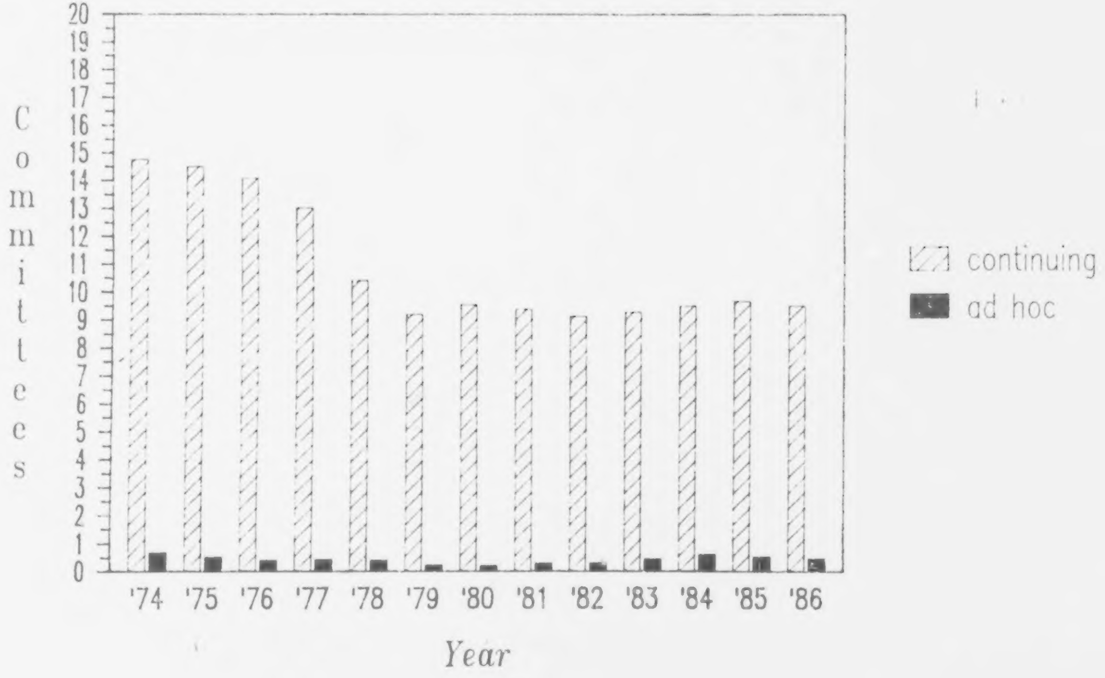


CHART 15

Type of Committee -- Continuing or Ad Hoc
(In hundreds)



CHAR. 16

Committee Authorization

(In hundreds)

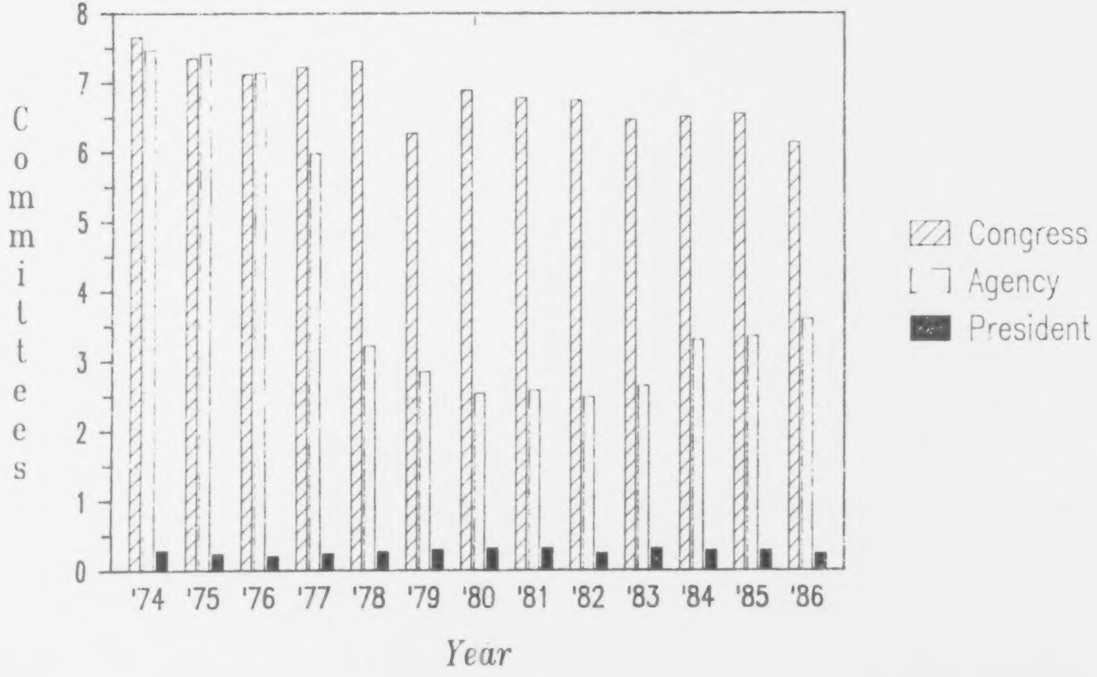
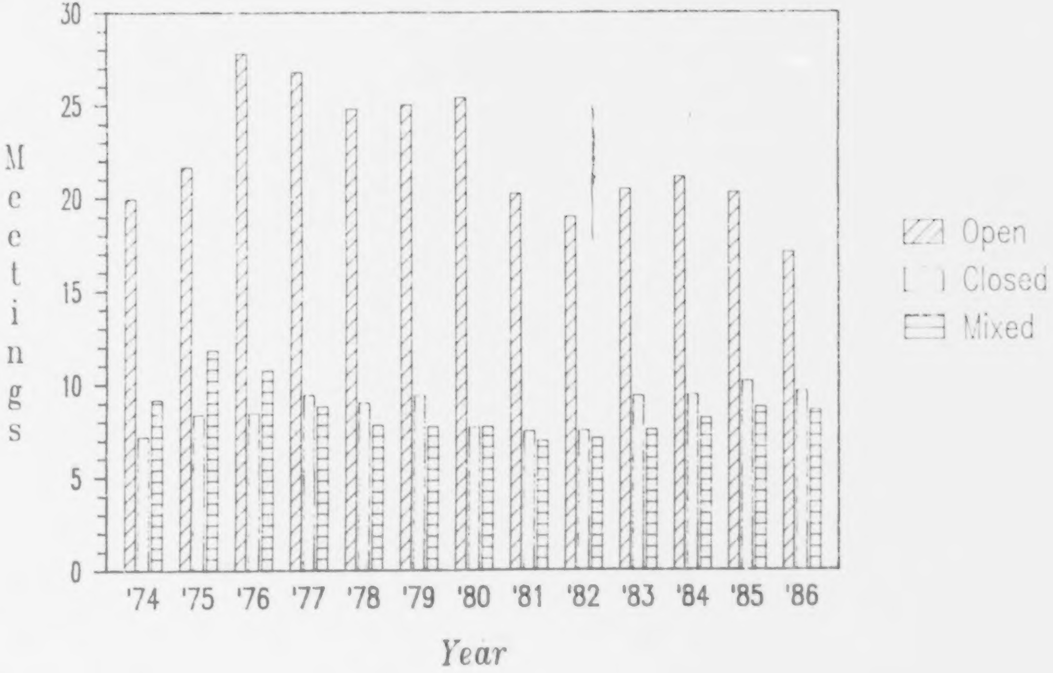


CHART 17

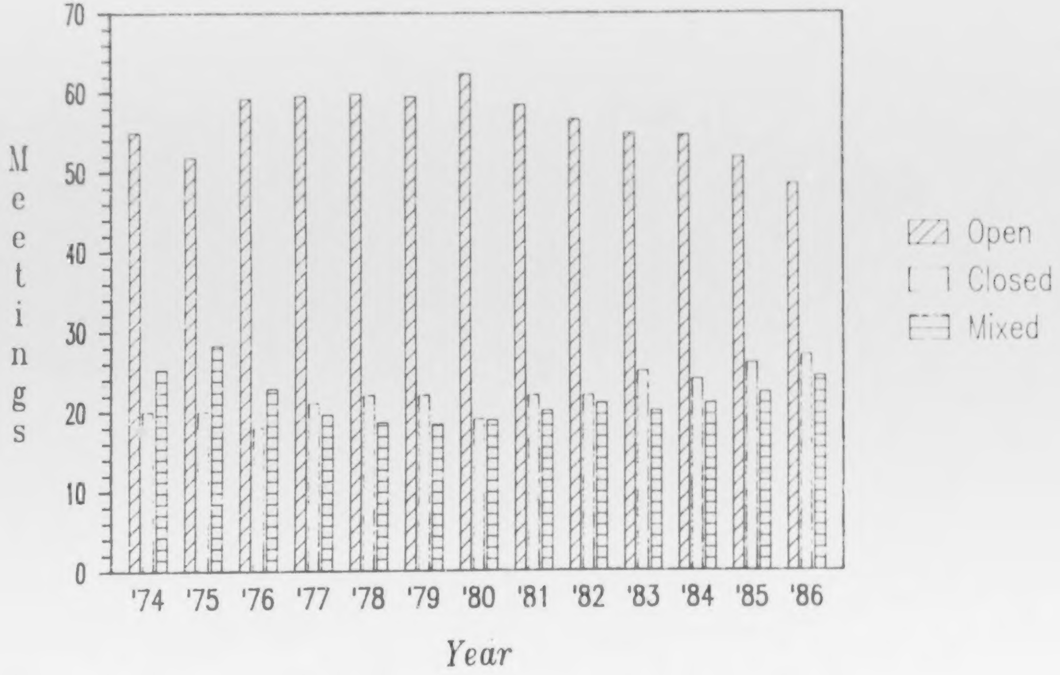
Type of Meeting

(In hundreds)



CHAR. 18

Percent of Open, Closed, and Mixed Meetings



Year	Nominal Cost	Real Cost	Number of Committees	Number of Meetings	Number of Reports	Number of Members
1972	$25,215,882	$25,215,882	1,439	0	0	0
1973	$31,110,810	$29,244,161	1,250	0	0	0
1974	$42,380,636	$36,023,541	1,489	3,626	1,014	22,702
1975	$51,769,400	$40,380,132	1,519	4,179	1,070	25,630
1976	$59,726,365	$43,600,246	1,447	4,694	937	27,432
1977	$64,932,210	$44,803,225	1,343	4,495	1,016	24,678
1978	$68,405,002	$43,779,201	1,079	4,146	1,003	22,348
1979	$88,086,974	$51,090,445	941	4,204	1,074	20,460
1980	$87,356,491	$44,551,810	974	4,074	1,111	21,461
1981	$80,102,083	$36,846,958	967	3,459	786	22,198
1982	$74,103,703	$31,864,592	947	3,352	706	19,333
1983	$75,896,547	$31,876,550	973	3,733	799	21,941
1984	$71,078,408	$28,431,363	1,010	3,865	768	25,162
1985	$77,552,206	$30,245,360	1,019	3,914	720	23,381
1986	$82,579,858	$31,380,346	997	3,519	666	24,600

Year	Nominal Cost	Real Cost	Nominal Cost per Report	Real Cost per Report	Nominal Cost per Member	Real Cost per Member
1972	$25,215,882	$25,215,882	$0	$0	$0	$0
1973	$31,110,810	$29,244,161	$0	$0	$0	$0
1974	$42,380,636	$36,023,541	$41,795	$35,526	$1,867	$1,587
1975	$51,769,400	$40,380,132	$48,383	$37,738	$2,020	$1,576
1976	$59,726,365	$43,600,246	$63,742	$46,532	$2,177	$1,589
1977	$64,932,210	$44,803,225	$63,910	$44,098	$2,631	$1,816
1978	$68,405,002	$43,779,201	$68,200	$43,648	$3,061	$1,959
1979	$88,086,974	$51,090,445	$82,018	$47,570	$4,305	$2,497
1980	$87,356,491	$44,551,810	$78,629	$40,101	$4,070	$2,076
1981	$80,102,083	$36,846,958	$101,911	$46,879	$3,609	$1,660
1982	$74,103,703	$31,864,592	$104,963	$45,134	$3,833	$1,648
1983	$75,896,547	$31,876,550	$94,989	$39,896	$3,459	$1,453
1984	$71,078,408	$28,431,363	$92,550	$37,020	$2,825	$1,130
1985	$77,552,206	$30,245,360	$107,711	$42,007	$3,317	$1,294
1986	$82,579,858	$31,380,346	$123,994	$47,118	$3,357	$1,276

Year	Nominal Cost	Real Cost	Nominal Cost per Committee	Real Cost per Committee	Nominal Cost per Meeting	Real Cost per Meeting
1972	$25,215,882	$25,215,882	$17,523	$17,523	$0	$0
1973	$31,110,810	$29,244,161	$24,889	$23,395	$0	$0
1974	$42,380,636	$36,023,541	$28,462	$24,193	$11,688	$9,935
1975	$51,769,400	$40,380,132	$34,081	$26,583	$12,388	$9,663
1976	$59,726,365	$43,600,246	$41,276	$30,131	$12,724	$9,289
1977	$64,932,210	$44,803,225	$48,349	$33,361	$14,445	$9,967
1978	$68,405,002	$43,779,201	$63,397	$40,574	$16,499	$10,559
1979	$88,086,974	$51,090,445	$93,610	$54,294	$20,953	$12,153
1980	$87,356,491	$44,551,810	$89,688	$45,741	$21,442	$10,936
1981	$80,102,083	$36,846,958	$82,836	$38,104	$23,158	$10,652
1982	$74,103,703	$31,864,592	$78,251	$33,648	$22,107	$9,506
1983	$75,896,547	$31,876,550	$78,003	$32,761	$20,331	$8,539
1984	$71,078,408	$28,431,363	$70,375	$28,150	$18,390	$7,356
1985	$77,552,206	$30,245,360	$76,106	$29,681	$19,814	$7,727
1986	$82,579,858	$31,380,346	$82,828	$31,475	$23,467	$8,917

Year	Committees	Congress	Agency	President	Continuing	Ad Hoc
1972	1,439	211	0	0	0	0
1973	1,250	241	0	0	0	0
1974	1,489	766	747	28	1,476	65
1975	1,519	735	742	23	1,450	50
1976	1,447	712	714	20	1,408	38
1977	1,343	722	598	23	1,302	41
1978	1,079	731	322	26	1,041	38
1979	941	627	285	29	921	20
1980	974	689	254	31	956	18
1981	967	678	258	31	940	27
1982	947	675	249	24	915	28
1983	973	647	265	31	930	43
1984	1,010	651	331	28	951	59
1985	1,019	655	336	28	968	51
1986	997	614	360	23	952	45

Year	Reports per Committee	Meetings per Committee	Members per Committee	Members per Report
1972	.00	.00	.00	.00
1973	.00	.00	.00	.00
1974	.68	2.44	15.25	22.39
1975	.70	2.75	16.87	23.95
1976	.65	3.24	18.96	29.28
1977	.76	3.35	18.38	24.29
1978	.93	3.84	20.71	22.28
1979	1.14	4.47	21.74	19.05
1980	1.14	4.18	22.03	19.32
1981	.81	3.58	22.96	28.24
1982	.75	3.54	20.41	27.38
1983	.82	3.84	22.55	27.46
1984	.76	3.83	24.91	32.76
1985	.71	3.84	22.95	32.47
1986	.67	3.53	24.67	36.94

year	meetings	open	close	mixed	Percent Open	Percent Closed	Percent Mixed
1972	0	0	0	0	.00	.00	.00
1973	0	0	0	0	.00	.00	.00
1974	3,626	1994	719	913	54.99	20.00	25.18
1975	4,179	2164	836	1179	51.78	20.00	28.21
1976	4,694	2779	845	1070	59.20	18.00	22.80
1977	4,495	2677	941	377	59.56	21.00	19.51
1978	4,146	2479	900	767	59.79	22.00	18.50
1979	4,204	2500	936	768	59.47	22.00	18.27
1980	4,074	2539	768	767	62.32	19.00	18.83
1981	3,459	2022	746	691	58.46	22.00	19.98
1982	3,352	1898	749	705	56.62	22.00	21.03
1983	3,733	2047	936	750	54.84	25.00	20.09
1984	3,865	2111	941	813	54.62	24.00	21.03
1985	3,914	2028	1013	873	51.81	26.00	22.30
1986	3,519	1705	959	855	48.45	27.00	24.30

45898 Federal Register / Vol. 52, No. 231 / Wednesday, December 2, 1987 / Rules and Regulations

§ 101–6.1007 Agency procedures for establishing advisory committees.

(iii) A description of the agency's plan to attain balanced membership. For purposes of attaining balance, agencies shall consider for membership interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This should be construed neither to limit the participation, nor compel the selection of any particular individual or group to obtain divergent points of view that are relevant to the business of the advisory committee.

18778 Federal Register / Vol. 52, No. 96 / Tuesday, May 19, 1987 / Proposed Rules

§ 101–6.1007 Agency procedures for establishing advisory committees.

(iii) A description of the agency's plan to attain balanced membership. For purposes of obtaining balance, agencies shall consider for membership interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This shall not be construed to limit the participation of any individual where such participation is necessary to obtain divergent points of view that are relevant to the business of the advisory committee.

19328 Federal Register / Vol. 48, No. 83 / Thursday, April 28, 1983 / Rules and Regulations

§ 101–6.1007 How does an agency head establish an advisory committee?

(iii) A description of the agency's plan to attain balanced membership. For purposes of obtaining balance, agencies shall consider for membership a cross-section of interested persons and groups with demonstrated professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This shall not be construed to limit the participation of any individual where such participation is necessary to obtain divergent points of view that are relevant to the business of the advisory committee. The letter shall be accompanied by two copies of the proposed charter.

U.S. Department of Transportation
Office of the Secretary of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 6 1987

Mr. James L. Dean
Director, Committee Management Secretariat
General Services Administration
Washington, D.C. 20405

Dear Mr. Dean:

The Department of Transportation has reviewed the Notice of Proposed Rulemaking on Federal Advisory Committee Management (52 F.R. 18774). I am pleased that the General Services Administration has responded to agency concerns by eliminating the provisions of the Interim Rule which were controversial and difficult to administer. I am confident that the final rule, as proposed, will be a very workable regulation.

The Department has one recommended revision to Subsection 101-6.1007(b)(2)(iii). It is suggested that the provision concerning divergent points of view be revised as follows:

> "...This shall be construed neither to limit the participation nor compel the selection of any individual in order to obtain divergent points of view that are relevant to the business of the advisory committee."

This change is recommended to diminish the threats of lawsuits by special interest groups or individuals who maintain they are required to be included in the membership of an advisory committee solely by virtue of their points of view.

We appreciate the opportunity to comment on the NPRM.

Sincerely,

Ruth Drinkard Knouse

Ruth Drinkard Knouse
Committee Management Officer

AUG 7 1987
[illegible] CMS

Mayo Foundation Rochester, Minnesota 55905 Telephone 507 284-2511

W. Eugene Mayberry, M.D.
President
Chief Executive Officer

November 13, 1987

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Senator Glenn:

Thank you for your letter regarding the activities of the Presidential Commission on the HIV Epidemic. I appreciate your concern, and anything your Committee can do to help the performance of similar commissions will be helpful.

I have been very careful to avoid discussing with anyone the events surrounding my resignation from the Presidential Commission. Anything I might have said would only provide fuel to prolong the recording of the problems with the Commission. I feel strongly that a maximum effort is necessary to fight this epidemic. The Commission needs a chance to do its best to advise the President.

It was one of the greatest disappointments of my life to have to resign. After months of trying, I felt I had no other choice. And now, I would like to avoid any further discussion and wish the Commission success in the future.

I have one recommendation to make regarding appointment of a commission such as this. It would be helpful if the Chairman could be more involved in selecting the members of the commission, such that a cohesive group could be formed.

I would like to commend the support I received from Secretary Otis Bowen's office, from the Public Health Service, and from the Center for Disease Control.

Thank you again for your letter. I am sorry I have not been of more help and will be grateful for your understanding.

Sincerely,

W. E. Mayberry

W. E. Mayberry, M.D.

WEM:bb

Established in 1919 by Dr. William J. Mayo and Dr. Charles H. Mayo
for the advancement of medical education and research

ROBERT D. ORR, GOVERNOR
WOODROW A. MYERS, JR., M.D., STATE HEALTH COMMISSIONER

OFFICE OF THE COMMISSIONER
INDIANA STATE BOARD OF HEALTH
1330 WEST MICHIGAN STREET
P.O. BOX 1964
INDIANAPOLIS, IN 46206-1964

ISBH
INDIANA STATE BOARD OF HEALTH

November 30, 1987

The Honorable John Glenn
United States Senate
Committee on Governmental Affairs
Washington, D.C. 20510-6250

Dear Senator Glenn:

I am in receipt of your request, dated November 6, 1987, to assist the Committee on Governmental Affairs of the United States Senate, which you chair, with a project involving the Presidential Commission on the Human Immunodeficiency Virus (HIV) Epidemic.

It is my understanding that, in general, the Committee is reviewing the adequacy of the Federal Advisory Committee Act to see if certain provisions need more clarification, as well as focusing on the President's Commission on the HIV Epidemic as a specific example. My comments then will reflect my experience as a former member of the Presidential Commission on the HIV Epidemic in relationship to this Act.

The Federal Advisory Act outlines some very broad and general guidance to committees formulated under this law, such as, they must have a clearly defined purpose, require membership which is fairly balanced, not be inappropriately influenced by the appointing authority, and contain provisions which will assure the advisory committee adequate staff. Although these concepts provide peripheral guidance to an advisory committee, they do not provide definitive oversight on the management of such committees. It would have been helpful to me, as a member of a Presidential commission, to have had an outline of the relevant provisions within the Act, perhaps in the form of a handbook that would describe the role of a Presidential commission, including answers to some of the common questions about how the group could subdivide the task involved, appointment of officers within the commission, travel and reimbursement guidelines, and perhaps common "pitfalls" to be avoided. It would have also been quite helpful to know the full range of options available to a commission in achieving its mandate or in lieu of such a list, a description of those options that are specifically unavailable for a commission to use. Such items should include:

- the dependence and/or independence a commission should have with respect to the relevant federal agencies,
- the ability or lack thereof to "subcontract" specific tasks to private consulting firms or to universities,
- definitions of public meetings vs. private working sessions.

Some of my experiences on the Commission, as outlined below, might explain why I believe such guidance is important.

I found that I was under consideration for an appointment approximately two weeks prior to the date the President announced the membership of the Commission. The first contact I had with other commission members took place on the White House grounds on the day of the President's announcement. There was a great deal of secrecy within the White House on who was to be appointed and, as a consequence, we knew little about each other prior to the first hastily put together gathering. I do not feel it would have been a breach of any security arrangements for commission members to have been briefed, even by telephone, on who the fellow commission members were and the essentials of their backgrounds.

After the initial meeting, I communicated regularly with the chairman, Dr. Mayberry, who subsequently asked me to consider the assignment of vice-chairman. Dr. Mayberry, in that role, asked me to concentrate on the Commission's relationship with legislative bodies, such as yours, and the House of Representatives, and to work closely with him on the issues of staffing. I accepted this assignment, not knowing at the time I accepted that there would be resentment of my appointment amongst several members of the Commission. In retrospect, it would have been helpful if those White House officials responsible for bringing us together at the initial meeting would have briefed us on the role of the chairman vis-à-vis the other members of the Commission. I believe that Dr. Mayberry's task would have been made much easier if commission members had been told of his specific powers and responsibilities in his role as chairman, including the appointment of committees, setting the agenda, delegating responsibilities to the staff, determining what constituted reimbursable expenses and settling disputes between commission members. In the absence of such "empowerment" of the chairman by the President or his representatives, these issues are unnecessarily left unresolved. If one chooses commission members whose egos are uninhibited, the issues outlined above can quickly become problems, and will certainly delay meaningful dialogue on solving the questions within the executive order. In my opinion, this is precisely what occurred with respect to the President's Commission on the HIV Epidemic.

Senator Glenn, you have asked how best to achieve the mandate of "balancing". The law specifies that various points of view be represented, but it does not specify what "weight" those points of view that are not concordant with mainstream thinking should be given. Active "balancing" would require that a thorough review of the written and stated opinions of the individuals under consideration would occur. I have no way of knowing whether such an investigation was completed prior to the President's announcement of July 24th appointing the Commission. In my discussions with White House staff, after being told I was under consideration, no questions were asked concerning my attitudes, beliefs or "points of view". However, in that I am a public official, frequently in contact with employees of the Department of Health and Human Services, it is possible that enough information was obtained without a specific request of me to provide this information. I have no knowledge of whether or not an evaluation was made of any other commission members to determine their points of view such that the portion of the law requiring "balancing" could have been met.

In your letter, you have asked my opinion on the Commission's ability to fulfill its task, since "two commission seats remain unfilled, and the deadlines for submitting the Commission's interim and final reports are fast approaching". As you are now aware, since your letter two additional members have been appointed to fill the seats vacated by Dr. Mayberry's and my resignation. I know both of the individuals who have been appointed, and both are quite knowledgeable in virtually all areas of importance in the epidemic.

Mr. Chairman, I would be negligent if I did not point out to you and members of your committee individuals who are truly dedicated public servants, who continue to serve this country well in the midst of its most serious public health threat of this century. The list is long, but it certainly includes Dr. C. Everett Koop, Surgeon General, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases and Dr. Jim Curran, AIDS Coordinator for the Centers for Disease Control. During my membership on the Commission, these men proved that the United States, when it has the will, is second to none in solving very difficult problems. These men deserve the support of the United States Congress in accomplishing a mission unprecedented in the nation's history.

Senator Glenn, although I did not have the opportunity to meet you as a member of the Commission, I certainly gained appreciation for a number of your colleagues who care very deeply about the health of the American people, and demonstrated their concern by providing testimony before the President's Commission on the HIV Epidemic earlier this fall. In the United States Senate, we heard from Senators Kennedy, Weicker, Dole and Danforth. Prior to that meeting, Dr. Mayberry and I met with one of your colleagues, the Honorable Lawton Chiles of Florida, who expressed his support for the Commission and provided helpful suggestions. Having had the opportunity to work with and hear the views of these individuals, I am reassured that our system of checks and balances within government serves to enhance rather than to inhibit the work of this country with its most serious public health threat.

If there are ways that I might be of further help to your committee, please do not hesitate to ask.

Sincerely,

WOODROW A. MYERS, JR., M.D.
STATE HEALTH COMMISSIONER
INDIANA STATE BOARD OF HEALTH

WAM/dw

PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC
655 15th Street NW, Suite 901, Washington, D.C. 20005 (202) 245-2437

RMAN
Admiral James D. Watkins (Ret.)

JAN 11 1988

The Honorable John Glenn
United States Senate
Washington, D.C. 20510

Dear Senator Glenn:

I hope the recent holiday season afforded you a much deserved break from the Washington grind.

As a follow-up to my testimony before the Senate Governmental Affairs Committee on December 3, 1987, I wanted to take this opportunity to thank you for the many courtesies which were extended to me that day, and also to let you know of my actions to address the concerns raised by representatives of the General Accounting Office (GAO) at the same hearing.

After reviewing more carefully the testimony of the GAO, I instructed my staff to improve proper Commission operation under the Federal Advisory Committee Act.

The following is a very brief summary of the issues raised by GAO and our corrective action.

1. Maintaining documents for public inspection and copying. Although the GAO stated its tests in this area were inconclusive, we have since established a public information area, which is easily accessible and contains copies of the hearing agenda, witness testimony, Commissioner briefing materials, minutes and transcripts of each hearing.

2. Prompt certification of Commission minutes. As an outside reporting service prepares the Commission minutes, we have worked with them to assure prompt preparation and certification of minutes. Minutes will be prepared within five working days, and will be certified no later than 10 working days after their receipt at the Commission.

3. Timely publication in the FEDERAL REGISTER of public meeting notices.
   Although most of the instances cited did not occur under the tenure of my chairmanship, these delays should not be a problem again as the Commission has now established a year-long schedule. This working plan should cut down on the short range scheduling conflicts faced by Commissioners in the past. We will meet the 15-day requirement in the future.

4. Proper maintenance of Commission personnel records.
   I believe the records referred to by the GAO were, at the time of the hearing, being maintained at the Department of Health and Human Services, according to GSA regulations. Copies of these records are now maintained at the Commission.

Again, I found your hearing to be of great assistance in improving the operation of the Commission. If you feel the need for clarification of any of the points I have raised, I would certainly be glad to respond.

Also, for your information, I have enclosed a copy of the preliminary decision issued by Judge Gasch regarding the Commission's composition and other related issues under the Federal Advisory Committee Act.

Sincerely,

James D. Watkins
Admiral, U.S. Navy (Retired)

Enclosure

cc: Commissioners
Rossyln Kleeman, General Accounting Office

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF PEOPLE
WITH AIDS, *et al.*,
Plaintiff,
v.
PRESIDENT RONALD REAGAN, *et al.*,
Defendant.

Civil Action
No. 87-2777

ORDER

Upon consideration of plaintiffs' Motion for Preliminary Injunction, the opposition thereto, and the record herein and for the reasons stated in the accompanying memorandum, it is by the Court this 16th day of December, 1987

ORDERED that plaintiffs' motion be, and hereby is, denied.

Oliver Gasch
United States District Judge
Oliver Gasch

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF PEOPLE WITH AIDS, ET AL., Plaintiffs,	Civil Action
v.	No. 87-2777-OG
PRESIDENT RONALD REAGAN, Defendant.	

COUNSEL: For plaintiffs: Patti A. Goldman, Alan B. Morrison, and Eric R. Glitzenstein, Public Citizen Litigation Group, Washington, D.C.

For defendant: Elizabeth Pugh, U.S. Department of Justice, Washington, D.C.

INTRODUCTION

History of the AIDS Commission

Since 1981, when the first cases of acquired immune deficiency syndrome ("AIDS") were diagnosed, more than 24,000 cases of the disease have been reported in the United States, and health officials estimate that more than one million Americans have been infected with the human immunodeficiency virus ("HIV"), which induces AIDS. National Academy of Sciences, Confronting AIDS 5 (Complaint, Exhibit A). In an effort to obtain expert advice on the "medical, legal, ethical, social, and economic impact" of AIDS, the President appointed the Commission on the Human Immunodeficiency Virus Epidemic ("AIDS Commission" or "Commission"). Exec. Order 12,601, 52 Fed. Reg. 24,129 (1987) (executive order issued June 24, 1987). The task assigned to the

Commission was to recommend measures for abating the spread of HIV, discovering a cure for AIDS, and caring for those who have AIDS. Id. Members of the Commission were to be "distinguished individuals who have experience in . . . medicine, epidemiology, virology, law, insurance, education, and public health." Id.

On July 23, 1987, the President appointed thirteen members to the AIDS Commission.[1] Statement by the Assistant to the President for Press Relations 1 (Press Release July 23, 1987). The press release paraphrased the specific tasks of the Commission enumerated in Executive Order 12,601. Among the areas to be studied were AIDS education programs, existing efforts to prevent the spread of AIDS, areas of present and future reasearch, the legal and ethical issues raised by the epidemic, and the United States' role in the international battle against AIDS. Id. at 1-2. The President directed the Commission to prepare a preliminary report by October 23, 1987 and a final report no later than June 24, 1988. The commissioners have met three times, and the Commission published its preliminary report on December 2, 1987.

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[1] The June 24, 1987 Executive Order provided for an 11-member commission, but the membership was expanded by two prior to appointment of the commissioners. Exec. Order 12,603, 52 Fed. Reg. 27,315 (July 16, 1987). The members appointed were William Eugene Mayberry (Chairman), Colleen Conway-Welch, John J. Creedon, Theresa L. Crenshaw, Richard M. DeVos, Burton James Lee III, Frank Lilly, Woodrow A. Myers, Jr., John Cardinal O'Connor, Penny Pullen, Cory SerVaas, William B. Walsh, and retired Admiral James D. Watkins. On October 7, 1987, two of these commissioners--Mayberry and Myers--resigned, and the President has recently appointed two replacements. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 10, 12; see infra pp. 4-5. Admiral Watkins has been elevated to the Chairmanship of the Commission.

The Plaintiffs and their Challenge to the AIDS Commission's Membership

Plaintiffs are a variety of organizations that work with AIDS patients, counsel minority communities particularly afflicted with the disease, and offer educational, legal, and health care services for homosexuals. One plaintiff is an AIDS victim. These plaintiffs purport to represent "people with AIDS, AIDS service providers, and the at-risk communities, which are excluded from the AIDS Commission."[2/] Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 13 ("Plaintiffs' Memorandum").

The present action is the culmination of plaintiffs' efforts to alter the membership of the AIDS Commission. They complain that the Commission is deprived of the balance of viewpoints required of every advisory committee under the Federal Advisory Committee Act ("FACA"). 5 U.S.C.S. App. I §§ 3 & 5(b)(2) (Law. Co-op. 1987). From plaintiffs' perspective, some commissioners hold views on AIDS that "are controversial or contra[ry to] widely accepted scientific evidence about the disease." Wash. Post, Aug. 26, 1987, at A1 (Complaint, Exhibit G). Plaintiffs recount the statements and actions of several

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[2/] Presumably, plaintiffs would assent to some modification of this representation in light of the recent appointment of Dr. Beny J. Primm and Kristine M. Gebbie. In response to these appointments, plaintiffs admit that the new commissioners "satisfy two of the concerns . . . raised in this lawsuit." Plaintiffs' Supplemental Memorandum to Proposed Findings of Fact and Conclusions of Law at 1 ("Plaintiffs' Supplement").

commissioners that are allegedly inconsistent with the "mainstream" views on AIDS.

In the plaintiffs' view, the Commission's imbalance results from the absence from the Commission of any representatives of two groups most likely to be affected by the commissioners' report--people with AIDS and AIDS health care providers. Plaintiffs' Supplement at 2. This image of the AIDS Commission, plaintiffs argue, requires that the membership be reconstituted to include representatives of AIDS victims and patient advocates and those providing health care and counseling to AIDS victims.

In early September of this year, plaintiffs urged the President and Health and Human Services Secretary Bowen to appoint additional members to the Commission to correct the imbalance. The President refused, stating through counsel that inclusion of members of every interest group would render the Commission unmanageable. In addition, the President's counsel insisted that the membership "is broadly constituted, and fully meets the requirement of balanced membership." Letter of Arthur B. Culvahouse, Counsel to the President (Oct. 2, 1987). After the resignation of two commissioners, plaintiffs implored the President to use the vacancies to remedy the alleged imbalance. Because the President failed to satisfy this demand, plaintiffs filed the instant action and motion for preliminary injunction.

On November 10, 1987, the President appointed two commissioners to fill the vacancies created by the October resignations. Dr. Beny J. Primm is President and Executive Director of the Urban Resource Institute and the Addiction Research and Treatment Corporation. The activities of these organizations include education of minority communities about AIDS. Also newly appointed is Kristine M. Gebbie, who holds a Master of Nursing degree and is Assistant Director for Health, Oregon Department of Human Resources and Administrator, State Health Division, Oregon. Ms. Gebbie also chairs the AIDS Task Force for the Association of State and Territorial Health Officers.

Commenting on these new appointments, plaintiffs note:

> The commission now has some representation of the at-risk groups that will be the target of prevention efforts. Because Dr. Primm works with drug addicts, and in particular with AIDS education in the Black community, he may be able to represent the interests of one of the communities that has been hardest hit by the AIDS epidemic.

Plaintiffs' Supplement at 4. Moreover, Ms. Gebbie's experience as a public health officer and AIDS task force member will bring to the Commission the perspective of public health care providers and administrators. Despite these appointments, which plaintiffs admit will "counterbalance some" of the allegedly extreme views on the Commission, Plaintiffs' Supplement at 1, they still complain that the Commission's membership is not balanced.[3] Id. In particular, plaintiffs insist that the Commission "has

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[3] Plaintiffs' Supplement also notes that the Commission has formed an advisory group comprised of health care professionals, including "medical doctors, social workers, psychologists, psychiatrists and others who work directly with AIDS patients." Plaintiffs Supplement, Exhibit HH.

"absolutely" no "representation of two affected groups"--AIDS patients and AIDS health care providers. *Id.* at 2.

THE MOTION FOR A PRELIMINARY INJUNCTION

This case presents for the Court's interpretation a somewhat ambiguous statute motivated by commendable goals but implemented with imprecise language that requires the Court to examine obscure legislative history in order to discern "the extent to which Congress intended to interfere with the President's formulation of policy." *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 530 (D.D.C.), *aff'd*, 711 F.2d 1091 (D.C. Cir. 1983). The task is a difficult one that is exacerbated by the urgency of the policy issues involved. The exigency of the need for a coherent and informed national AIDS policy is beyond question. Because the Court is presently faced with a motion for a preliminary injunction, only a brief discussion of the substance of plaintiffs' action is necessary before considering the merits of their motion.

Plaintiffs' Claim that the AIDS Commission Lacks a Balanced Viewpoint

The preamble to Executive Order 12,601, which created the AIDS Commission, expressly cloaked the Commission with the credibility and prestige of the Federal Advisory Committee Act. 5 U.S.C. App. I (Law. Co-op. 1987). The imprimatur of FACA, however, is not unconditional. The membership of an advisory committee must "be fairly balanced in terms of the points of view represented and the functions to be performed." Id. § 5(b)(2). This requirement was imposed by Congress to eliminate suspicions that advisory committees "do not adequately and fairly represent the public interest [or] that they may be biased toward one point of view or interest."[4] S. Rep. No. 92-1098, 92d Cong., 2d Sess. 5 (1972), reprinted in Federal Advisory Committee Act Source Book 155 (1978) [hereinafter Source Book]. Plaintiffs complain that the present membership of the AIDS Commission is lacking in balance because the groups most directly affected by the Commission's work--AIDS victims and AIDS health care providers and counselors--are not represented.

Plaintiffs' Motion for a Preliminary Injunction Against Further Activity by the AIDS Commission

Fearing that the Commission's imbalance and "lack of expertise" may adversely affect the groups plaintiffs represent, they seek to enjoin any further action by the Commission until the imbalance is rectified. Plaintiffs further demand that the President be directed to "take immediate action to ensure that the AIDS Commission contains a balanced membership." Complaint at 8.

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[4] Congress was also concerned that the proceedings of advisory committees had been unnecessarily isolated from public scrutiny and participation. S. Rep. No. 92-1098, at 155. Section 10(a) of FACA "establishes the standard of openness in advisory committee deliberations," id. at 164, requiring that meetings "be open to the public." 5 U.S.C.S. § 10(a) (Law. Co-op. 1987). This standard of openness "is to be liberally construed." S. Rep. No. 92-1098, at 164.

Plaintiffs admit that they will have the opportunity to present their views to the AIDS Commission. Plaintiffs' Memorandum at 23. Consequently, their claim that they "will be shut out of the process", id. at 28, is, at least, overstated. Indeed, plaintiffs have directed the Court's attention to the recent appointment of an advisory group from which the Commission will draw expertise on the provision of health care to AIDS patients. Nevertheless, plaintiffs insist that merely addressing the Commission from the public floor is "not enough," id. at 23; instead, the requirements of FACA can be satisfied only if AIDS health care providers are a "part of the Commission's membership and deliberations." Despite plaintiffs' vigorous advocacy, the Court is not persuaded that this argument is likely to succeed.

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959). The extraordinary nature of a preliminary injunction demands that the requesting party carry the burden of establishing the basis for such relief. The framework for evaluating a demand for a preliminary injunction is well-known in this circuit. In order to enjoin any action by the AIDS Commission, plaintiffs must make a "strong showing that [they are] likely to prevail on the merits" and must demonstrate that they will be irreparably harmed in the absence of such relief. Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958); see Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842 n.1 (D.C. Cir. 1977). Additionally, the Court must be satisfied that defendants will not suffer substantial harm and must evaluate the impact of a preliminary injunction on the public interest. Id. To the extent that the injunction may adversely affect the public interest, plaintiffs' burden to show irreparable harm is enhanced. Yakus v. United States, 321 U.S. 414, 440-41 (1944); see Sampson v. Murray, 415 U.S. 61, 83-84

(1974) (standard applied to stays affecting administration of goverment is more stringent).

Plaintiffs Demonstrate No Likelihood of Success on the Merits

Plaintiffs' effort to demonstrate a likelihood of success on the merits cannot be evaluated by any fixed standard. *Holiday Tours*, 559 F.2d at 843. The required probability of ultimate success will vary with the gravity of the harm that will occur in the absence of a preliminary injunction. *Id.* The Court's task to prognosticate in this case is made even more difficult by the obscurity of plaintiff's statutory claim and the dearth of guidance from Congress or the courts. *See* *National Anti-Hunger*, 557 F. Supp. at 530; Cardozo, *The Federal Advisory Committee Act in Operation*, 33 Admin. L. Rev. 1, 55 (1981) (voluminous legislative history does not resolve doubt as to meaning of "fairly balanced").

FACA requires that the AIDS Commission "be fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C.S. App. I § 5(b)(2) (Law. Co-op. 1987). The ambiguity of this language is resolved somewhat by the legislative history which states that "membership of the [Commission] shall be representative of those who have a direct interest in the purpose" of the Commission. S. Rep. No. 92-1098, at 9, *reprinted in* Source Book at 159. Extrapolating from the Senate Report, plaintiffs argue that the "extraordinarily broad mandate" of the AIDS Commission and "fundamental common sense" require that membership of the Commission include representatives of people with AIDS and people who provide health care and other services to AIDS patients. Plaintiffs' Memorandum at 19; Plaintiffs' Supplement at 2, 4. Further, plaintiffs insist that the extreme views held by some commissioners will undermine the viability of the Commission's recommendations unless commissioners with countervailing views are appointed. Plaintiffs' Memorandum at 19-27.

Defendants respond that the varied backgrounds of the commissioners leave "no doubt" that the AIDS Commission is balanced for the tasks with which it has been charged. Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 12 ("Defendants' Memorandum"). Moreover, the composition of the Commission satisfies more of plaintiffs' demands than they admit. Two commissioners--Gebbie and Conway Welch--are members of two plaintiff organizations, and another is directly involved in the treatment of AIDS patients--Cardinal O'Connor. Id. at 13-14.

Addressing plaintiffs' disparaging characterization of the views of some commissioners as "extreme," the Court notes that the views of nine commissioners are not attacked in plaintiffs' motion. Plaintiffs' silence as to these commissioners is eloquent as the Court evaluates the likelihood that the FACA claim will succeed. Because plaintiffs have the burden of persuasion on this point, the Court must assume that the views of these commissioners are in the "mainstream" in which the plaintiffs place themselves. Were this true, the alleged imbalance would not be as severe as plaintiffs allege and, probably, would not exist at all.

Plaintiffs' selective attack on some of the commissioners betrays the surrealistic nature of the standard they have fabricated under FACA's balanced membership requirement. Plaintiffs imply that FACA permits groups which feel that they will be most affected by the views of an advisory committee must be permitted to define the "mainstream" of views on the issues before the committee. They also suggest that these groups must be allowed to assert peremptory challenges against those commissioners who, according to the groups' evaluation, hold opinions outside the "mainstream." Alternatively, plaintiffs' standard would allow these affected groups to reserve seats on advisory committees for persons who the groups believe will advocate the groups' interests.

The recommendations of the AIDS Commission will inevitably affect a great number of people who are neither AIDS patients nor AIDS health care providers. Indeed, contrary to plaintiffs' oft-repeated claim, the impact on AIDS patients will only be felt after the network of medical, legal, and social organizations coping with the disease evaluate and, perhaps implement, the Commission's recommendations. Given the wide-ranging impact of the thirteen-member commission's work, it would be impossible to include among its members a representative of every group that will be significantly affected by the commission's work.

More importantly, the standard advocated by plaintiffs greatly exaggerates the burden imposed by FACA. "[T]he legislative history makes clear [that] the 'fairly balanced' requirement was designed to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee." National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983) (emphasis added) (citing S. Rep. No. 92-1098, at 9). Neither FACA, the legislative history, nor National Anti-Hunger guarantees that affected persons or groups will be permitted to choose the members or that their viewpoint will be overwhelming on, a majority of, or even significantly represented on the Commission. Plaintiffs attack on four of thirteen members is inadequate to demonstrate a likelihood that plaintiffs will prove an absence of "some representation" of their interests. See Virginia Petroleum, 259 F.2d at 925; Holiday Tours, 559 F.2d at 843-33.

Apart from the factual disputes and the ambiguity of FACA, plaintiffs' tacit suggestion is troubling that every commissioner must be assigned a viewpoint score, that the scores of all commissioners must be averaged, and that the average must fall within the "mainstream" as plaintiffs would define it. Such a task could be accomplished only with great difficulty and even then with questionable accuracy. Consequently, plaintiffs' burden is not merely to demonstrate that some commissioners hold views that are contrary to the interests of AIDS patients, but to show that the composite viewpoint of the commission as a whole is not "fairly balanced." In the context of the instant motion for a preliminary injunction, plaintiffs have failed to demonstrate "a substantial indication of probable success." Virginia Petroleum, 259 F.2d at 925; see Holiday Tours, 559 F.2d at 844 (excessively fine examination of merits at early stage of litigation is undesirable). This deficiency is of particular importance in light of the absence of any irreparable harm to plaintiffs from the continued activity of the AIDS Commission.

Plaintiffs Have Failed to Demonstrate that Irreparable Harm Will Flow if the Commission's Activities Are not Enjoined

The prevention of irreparable harm is the primary function of preliminary injunctive relief. Beacon Theatres, 359 U.S. at 506-07; Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). By maintaining the status quo, injunctive relief permits a Court to preserve its ability to grant effective relief. Holiday Tours, 559 F.2d at 844. Such extraordinary relief is appropriate, however, only if the party urging the preemptive action can demonstrate that it will suffer irreparable harm if the injunction is not issued. The burden to make this showing is greater when, as in this case, plaintiffs are unable to demonstrate a likelihood of success on the merits, id. at 843, and the injunction will interfere with the ordinary course of governmental activity. Sampson, 415 U.S. at 83-84; Yakus, 321 U.S. at 440-41.

Cognizant of their burden, plaintiffs have alleged that any action by the Commission with its present membership would cause irreparable harm to the interests that plaintiffs purport to represent. However, "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The [plaintiffs] must provide proof . . . indicating that the harm is certain to occur in the near future." Wisconsin Gas, 758 F.2d at 674 (emphasis in original). Speculative or theoretical harm, no matter how irreparable if it occurs, is inadequate to justify a preliminary injunction. Id.; see National Nutritional Foods Association v. Califano, 603 F.2d 327, 333-34 (2d Cir. 1979) (inappropriate to enjoin prospective agency action since adequate remedy available if action actually taken); Metcalf v. National Petroleum Council, 553 F.2d 176, 184-85 (D.C. Cir. 1977) (speculative nature of alleged injuries precludes standing under FACA).

Plaintiffs fear that their "viewpoints and perspectives . . . will be shut out of the process, and [that] the Commission will shape its deliberations and recommendations to their detriment." Plaintiffs' Memorandum at 28. The harm prophesied by plaintiffs is that the Commission "may" make recommendations adverse to plaintiffs' interests, that the President, Secretary Bowen, and others "may rely" on the Commission's report in shaping federal AIDS policy, and that the public "may" vest the Commission with the credibility of a committee that complies with FACA's balanced viewpoint requirement. Id. at 29. Further, without an injunction, the Commission will issue its preliminary report, defining its mission and scope and, plaintiffs argue, tainting permanently the Commission's work with the existing imbalance of viewpoints. Id.

The plaintiffs' characterization of the potential results if a preliminary injunction does not issue betrays the speculative and theoretical nature of the anticipated harm. That the President or his advisors "may" rely on the Commission's report or that the public "may" attach credibility to that report is purely speculative; advice by its very nature may be heeded or rejected in the discretion of the advisee. Moreover, the contents and tenor of reports that the AIDS Commission may issue are, at best, uncertain.[5] Any harm that may flow from the Commission's recommendations can certainly be prevented at the time that those recommendations become more than guesswork.

The Court reiterates that the plaintiffs are not entitled under FACA to a Commission whose recommendations are certain to comport with the views of AIDS victims or AIDS health care providers and counselors. Consequently, a properly constituted Commission may have members whose views are "extreme." Indeed, the subjectivity of a characterization of a particular view as "extreme" bespeaks the speculation inherent in plaintiffs' complaint. Finally, it appears that the only substance left to the complaint following the appointment of commissioners Primm and Gebbie is that no AIDS victim has been appointed a commissioner. Given the representation of other plaintiff groups, the potential harm from this omission is at best aleatory.

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[5] The threat of irreparable harm is not enhanced by the recent publication of the Commission's report. Certainly, the report states that the work of the Commission will affect AIDS patients and health care providers. Plaintiffs' conclusion that a fortiori they will suffer irreparable harm simply misconstrues this element of the preliminary injunction analysis. The Court is concerned with harm that will occur, and as plaintiffs admit, the Commissions work may affect them "positively." Given that plaintiffs may not be harmed at all, the harm that they foresee as possible cannot be regarded as irreparable.

The Public Interest Is Best Served by Permitting the Commission to Continue its Work

Another "uniquely important" factor in the preliminary injunction calculus is the potential harm to the public interest from such an injunction. National Association of Farmworkers v. Marshall, 628 F.2d 604, 616 (D.C. Cir. 1980); Virginia Petroleum, 259 F.2d at 925. Both parties acknowledge the urgency of the AIDS problem, yet plaintiffs demand that the AIDS Commission be restrained from any further work on the hypothesis that its work *may* be biased. As noted earlier, any injury that might result from an imbalance of viewpoints, if any, on the Commission can be remedied at the time that the Commission issues its report or recommendations. Plaintiffs' apprehension, however, that the Commission's work will be impaired by the alleged imbalance and that its report will delay the development of a useful national policy on AIDS does not warrant the grant of a preliminary injunction. Consequently, enjoining further activity by the Commission could only harm the public interest.

CONCLUSION

Alleging that the AIDS Commission is composed of persons who hold viewpoints outside of the "mainstream," plaintiffs seek to enjoin any further activity by the Commission and to compel the President to appoint new commissioners who will imbue the Commission with viewpoints allegedly required under section 5(b)(2) of FACA. The extraordinary relief requested by plaintiffs would be premature. Plaintiffs are not likely to succeed on the merits of their complaint and no irreparable harm is likely to result in the absence of a preliminary injunction. Further, if the harm presaged by plaintiffs were to occur, an adequate remedy would be available at that time.

Oliver Gasch
Judge

Date: Dec. 16th 1987

TESTIMONY OF PHILIP J. HARTER
BEFORE THE
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
CONCERNING
THE FEDERAL ADVISORY COMMITTEE ACT

I am Philip J. Harter, a lawyer here in Washington, who is largely responsible for the development of the concept of regulatory negotiation. It is a procedure by which an agency assembles representatives of interests that would be substantially affected by a regulation, including a senior official of the agency itself, to negotiate the terms of a rule. These committees operate under the Federal Advisory Committee Act. I have served as the mediator for a number of regulatory negotiations and as an advisor to several agencies in establishing the process. In other capacities, I have worked with statutorily created advisory committees. I therefore have a firsthand, practical experience with the operation of Federal advisory committees.

I am also a professor of administrative law at the University of Maryland School of Public Policy and am a former member of the Council of the Section of Administrative Law of the American Bar Association. Hence I also approach advisory committees from a broader perspective with respect to their contribution to administrative law in general. Finally, I have been a member of the Federal Bar Association's Select Committee on FACA that has exhaustively reviewed the Act and has been active in making recommendations concerning its administration.

Although I could spend a great deal of time talking about the various issues raised by the obscure Federal Advisory Committee Act, I want to make three main points:

- Advisory committees that are empaneled to address a specific issue are likely to be real bargains for the government; those established by statute may not be, and their use should be critically reviewed by Congress and eliminated as a requirement.

- The central administration of the substantive provisions of the Act and its accompanying paperwork are cumbersome and probably counterproductive; the agency should be authorized to establish committees without external regulation.
- The conflict of interest law applicable to advisory committees is extraordinarily complex and sometimes contradictory; both the terms of the conflict of interest provisions of the criminal code and the confusion over their applicability inhibit the achievement of the critically important balance of membership and the securing of important views; the conflict of interest requirements should be clarified within the Act itself.

Advisory committees that address specific problems are a value to the government.

Those created by the Agency.

Advisory committees that are empaneled to address a specific issue are generally a true bargain for the government. They are a means by which interested members of the public can participate in the development of agency policy, ranging from complex rules, to the criteria used to make decisions, to the processes the agency will use to conduct its business. Advisory committees enable an agency to gain an extraordinary breadth of technical expertise at a low, marginal cost. How else, for example, could an agency obtain the enormous range of experience that it is able to tap through advisory committees?[1] Moreover, through advisory committees agencies can gather a practical insight into how real life situations work, something that it is usually quite difficult for agencies to do; we all know that while agencies may generate mounds of abstract data, the view from inside the Beltway is often very different from that of the shop floor. Finally, what is frequently needed by an agency is to be sure that it understands the views of its constituencies. Since much of what the government does, after all, is political, this ability to reconcile competing interests is critical in achieving the government's aims. Advisory committees are a better way of doing this than ad hoc calls or iterative supplication of the individual interests.

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[1] For an elaboration on my views with respect to the limitations on the efficacy of notice and comment rulemaking and, by analogy, other means by which interested parties submit their views to an agency without the opportunity to explore their respective positions and needs, see Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L. J. 1 (1982).

Committees created by statute may be a process in search of a problem.

The oft-expressed concern over committees being expensive in terms of money expended for their meetings and demands on agency time for their servicing may be legitimate for those in which the agency has little choice -- they are required by statute to meet, and the agency is required by statute to consult with them, even if there are no specific problems to be resolved. I have attended several advisory committee meetings that were, to put it kindly, an utter waste of time; they were consulted solely because the statute said they must. Committees that are created to resolve a specific issue therefore need to be distinguished from those that are created by statute.

Congress should systematically review the utility of those committees which are established by statute and those which an agency is authorized -- urged -- to create. It is, of course, perfectly logical for important constituents to want to force an agency into consulting with it with respect to policy decisions and do so by persuading Congress to include mandatory consultation with an advisory committee as part of the agency's organic legislation. But, from the overall perspective of administration, the better response would seem to be that the creation of such committees should be left to the discretion of the agency itself.

The agency can determine at the time if advice as to an issue would be beneficial; if it is, the agency can create an advisory committee at that time. If, on the other hand, the constituents felt frozen out by an intractable agency, two responses are in order: First, having representatives sit on an advisory panel is unlikely to carry much sway in that situation, so the statutorily created committee would probably not be very productive anyhow. Secondly, Congressional and White House oversight remains effective and the agency can be called to task for not consulting more broadly.

Agencies should be authorized to establish committees free of undue redtape.

Hostility to committees is misplaced.

Notwithstanding the fact that agencies derive substantial benefits from properly used advisory committees, there seems to be a latent hostility to advisory committees in the Act itself, in its administration, and in the speeches of the politicians. Why else would an agency head have to seek the permission of another agency, and oftentimes two other agencies, before being permitted to empanel a committee? Why else would the Act be so rife with paperwork? Why else would a committee be regulated tantamount to a carcinogen?

The Act was clearly designed to rectify abuses, especially the securing of advice from only one side of a controversy and excluding other legitimate interests from the discussions. To remedy this potential for abuse, the Federal Advisory Committee Act imposes major performance requirements on the use of advisory committees that are both necessary and appropriate. The Act requires that a committee be balanced, that notice be provided for public participation in the affairs of an advisory committee, that they conduct their business in the open, and although not in the Act itself, that members be free of conflicts of interest. These protections ensure that agency officials receive the full range of advice and are not "captured" -- actively or passively -- by special interests. Once these protections are in place, we should recognize and celebrate -- indeed encourage -- the appropriate use of advisory committees.

Balance and openness are the critical ingredients.

The single most important provision of the Act is undoubtedly its requirement that committee membership be balanced: it ensures that the agency will receive the full perspective on an issue. When empaneling a committee the agency needs to engage in an outreach effort to identify those who would be substantially interested in the decision. That means not only those who are to be regulated, but also those who would be benefitted, those who have technical expertise in the subject matter, those who study the area, and those who engage in a type of "oversight" or who could otherwise aid in the resolution of the decision. These are critically important requirements. The determination as to who should sit on a committee, therefore, is a function of the issue to be addressed. The need may be for breadth of perspective, for example, when determining what grants are to be made, or it may be for technical expertise based on a variety of perspectives, or it may be some other sort of "balance" depending on the recommendation to be made.

Moreover, to ensure public faith in the recommendations that are made by committees it is also important that, barring limited and specific exceptions, that they conduct their business in the open, subject to public scrutiny.

Both of these requirements are providently set out in the Act itself.

Centralized control and paperwork are unnecessary and counterproductive.

Given the performance standards contained in the Act, it seems anomalous that before an agency can establish an advisory committee, it must secure the approval[2] of the General Services Administration, and oftentimes of the Office of Management and Budget. This "Mother-may-I" approach is not only bureaucratically unnecessary, it is often counterproductive.

We entrust billions and billions of dollars of the American economy to the discretion of agencies in interpreting and implementing complex statutory requirements. Why, then, must an agency seek permission to establish a committee when its administrator has determined that doing so is the most efficacious way to discharge its awesome responsibilities?

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[2] While technically the agency need only "consult" with GSA which in turn may consult with OMB, in fact the practice has been that no committee is established without the full blessing of the other agency. The consultation is therefore de facto regulation.

Because of this requirement for permission, agencies at times engage in needless wrangling. Or, more perniciously, it is simply easier for agencies to go underground and not bother with FACA at all since the transaction costs of compliance are too great. Agencies not infrequently ignore FACA since they view it as too cumbersome. As a result, some of the necessary and appropriate protections of FACA may not be achieved in these underground committees. This seems to be one of those situations where trying to achieve more actually accomplishes less: extensive regulation probably produces less protection. Moreover, one would have to doubt that a munchkin somewhere in the approving agency really knows more about whether the committee is "essential"[3] and whether the statutory proscriptions are complied with than the agency, its head, and its legal staff. The Act would achieve more, be less expensive to administer, and result in better committees if the agency itself were authorized to establish committees without the "Mother-may-I" approach and with a drastic reduction of the accompanying paperwork.

If the agency did not comply with the performance criteria of the Act -- such as balance, notice, and openness -- the courts would be available for appropriate redress. Courts have not imposed very intimidating sanctions on agencies that have violated the Act, so perhaps the Act should be amended to provide that action taken on the basis of advice of an improperly administered advisory committee would be invalidated and have to be separately supported. Moreover, Congressional oversight can be a powerful tool for preventing abuse.

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[3] Federal Advisory Committee Act, Sec. 2(b)(2); proposed rule 41 CFR 101-6.1002 (a), 52 Fed. Reg. 18,774, 18,775 (May 19, 1987).

Very few governmental procedures could pass a rigorous application of the "essential" test; the administrative process has sufficiently many redundancies built in that any one of them is almost never "essential" to the public interest. That being so, the administration of the Act would benefit from having Congress provide a more realistic criterion by which the appropriateness of establishing committees can be judged.

The point is that the agency is in a far better position to determine if the establishment of the committee is worth it to the agency in terms of obtaining technical advice or assuaging important political constituents.

The conflict of interest law applicable to advisory committees is hopelessly complex and inhibits achieving the important goals of balance and broad participation.

The law concerning the conflicts of interest applicable to advisory committees is confusing at best and is in great need of clarification. It is wildly technical,[4] so that I will only highlight some of its major aspects. I have been working with your staff in this matter and would be glad to continue to do so.

It is, of course, appropriate to require in some instances that the members of an advisory committee do not have any conflict of interest that would cloud the judgment offered the agency. That would include conflicts at the time of participating on the committee and limitations on taking actions inconsistent with that participation at a subsequent time. But, the general conflict of interest duties applicable to government employees and special government employees in general do not always fit comfortably with advisory committee members, and consequently they need to be clarified.

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[4] A memorandum concerning conflicts of interest with respect to advisory committees that I wrote several years ago is attached as an appendix to this testimony.

Although FACA itself certainly does not make any distinction concerning the types of advisory committees, it has been held that a member of an advisory committee may serve in either an individual or a representative capacity. Someone who serves in a representative capacity may not be regarded as an employee of the government, since such a person serves on the committee to present the views of another organization or interest: that is, the person serves precisely because he or she has a conflict, that is loyalty to another, since the government wants to secure the views of that other interest.

Unfortunately, however, the guidelines draw a rigid distinction that any member who is paid for participating on a committee is to be regarded as a special government employee regardless of whether they are there to represent the views of an interest or are serving as an individual with no external ties. Thus, if an organization cannot afford to incur the costs of participating and the agency agrees to defray those costs, as is contemplated in the Act,[5] that representative is then regarded as a special government employee, and hence subject to conflict of interest restrictions that someone across the table who participated without funds does not face. This distinction seems totally out of keeping with FACA's requirement for balance and fair treatment, since it leads to inhibitions on the part of some but not others; that clearly inhibits the willingness of some interests to participate in an advisory committee.

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[5] 7(d)(1).

Moreover, the distinction seems inappropriate as a matter of law. The representative serving as a member or consultant to the committee would clearly be regarded as a "independent contractor" under normal legal analysis. Surely no one would think their plumber or lawyer or auto mechanic is an "employee" simply because they are paid for their services; similarly, when a representative of a broader interest participates on a committee, they are representing that interest and are not an employee of the government. Indeed, the customary test for determining whether someone is an independent contractor is whether the nominal "employer" has the power to control the details of the execution of the responsibility, and FACA explicitly prohibits that from occurring.[6] Thus, FACA itself would seem to prohibit the kind of distinction that has grown up in this area.

This distinction between "employee" and "independent contractor" has to a certain extent been followed in the administration of the Act. The implementing regulations and the guidelines apply the analysis to "consultants" to committees, but not "members". In other instances, however, the distinction between and consultant and a member is blurred so that it appears that a "consultant" may also be a committee member; if so, which branch of the law applies -- that which analyzes whether the person was paid to obtain advice as an independent contractor or that which says that pay equals employment status? It seems to me hard to tell what the difference is between consultants and members. If a consultant is not a member, it is second-class participation, since presumably only members participate in the end deliberations. If, on the other hand, a consultant is a type of member, then why the distinction?

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[6] 5(b)(3), as applied by 5(c), provides in part that the agency shall make "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment."

In addition, some agencies assert that the members of a committee are serving in their individual capacities, and hence not as representatives, even though the members are employed full time by another organization. Thus, for example, someone who is employed full time for General Motors but who is serving on such a committee within the sphere of his expertise, would be regarded as a special government employee. Not only is that a highly anomalous result, the potential liability it may impose on such an individual may cause him to decline the appointment. Thus, the conflict of interest law may mean it is more difficult for agencies to secure the talent and balance of perspectives they need.

Nothing less than whether the person might go to jail turns on the obscure answer to the question as to whether the status is that of an employee, special or otherwise. Thus, such a person may have substantial limitations on his or her activity because of the service on the committee. As a result, some people find it is more prudent to decline membership than to stare at the confusion in the criminal law over what may and may not be done.

The restrictions on the subsequent activities of advisory committee members should be clarified. The current conflict of interest provisions are simply unclear as to whether they apply. For example, someone who served as a special government employee for more than 60 days of the year (how do you count the days?) is prohibited from personally representing any person before their former agency in connection with any particular matter for a period of one year. Does that mean that someone who participated on a committee that was established to resolve some of the technical issues of a complex rule, but who was paid something to enable them to participate or who is employed by a company or public interest group that is clearly and unequivocally involved in the subject matter but who has precisely the technical expertise the agency seeks, may not file comments on behalf of the interest that he or she represents on a full time basis at the risk of going to jail, even though the Act itself contemplates paying individuals for their service on committees and otherwise obtaining the advice of knowledgeable people? As a practical matter, it is very difficult to determine precisely what conflict of interest provisions apply to advisory committee members and consultants.

An important protection is the disclosure of conflicts. For example, in peer reviews of grant applications or scientific decisionmaking or regulatory negotiations, what is essential is the disclosure of the substantive interests the participants may have so that true balance may be achieved and prejudice warded off. Care must be taken, however, that the disclosure statements themselves do not become so onerous and depriving of privacy that responsible individuals will not participate. The conflict of interest provisions applicable to advisory committees clearly are in need of careful revision and should be included in the Act itself.

Conclusion and Recommendations.

Based on my observations, study, and experience, I end up with the following conclusions and recommendations:

- Advisory committees that are established to address a specific problem are generally a highly cost effective administrative process if one looks at the broad environment in which they operate. Those that are created by statute with a non-specific goal, may well not be.

- Recommendation: Congress should conduct a review of statutorily created advisory committees and unless it is clear that the committee is performing a substantial, cost effective function, it should be abolished as a requirement, and the agency should be authorized to establish such a committee if it believes it would be beneficial to do so.

- The centralized control and bureaucratic redtape surrounding the establishment and administration of committees is counterproductive and inconsistent with the discretion normally accorded agencies.

- Recommendation: Agencies should be authorized to establish committees without imperious consultation and to manage them in any way it sees fit, so long, of course, as the substantive requirements of the Act are met.

- The conflict of interest provisions of the criminal code are unclear as they apply to advisory committee members and consultants, and the limitations on activities inhibit a full and robust participation by a broad range of individuals who should be available for participation on committees, thereby making the achievement of the critically important balance more difficult and sometimes impossible.

- Recommendation: The Federal Advisory Committee Act should be amended to provide its own conflict of interest requirements. These should be of the "disclosure" variety, in that any member of or consultant to an advisory committee should have to disclose any potential conflicts of interest with respect to participation; if the agency determines that the benefit from participation outweighs any potential conflict, that person should be exempt from any subsequent liability for that conflict. Finally, a committee member should not be regarded as a government employee, special or regular, on account of the advisory committee.

July 16, 1984

Advisory Committee Members and the Federal Conflict of Interest Statutes

Summary

The federal conflict of interest statutes (18 U.S.C. Sections 202-209) apply to all officers and employees of the federal government. They prohibit any advisory committee member who is considered a government employee from representing any entity other than the government in any proceeding involving a matter in which the "employee" has participated and in which the government has an interest. They also ban employees from participating in governmental decisions in which they have a personal financial interest. The conflict of interest laws, however, do not define who is an officer or employee of the United States and hence subject to their proscriptions. Title 5 of the U.S. Code defines these terms for the purposes of the civil service laws, but these definitions are not categorically applied to the status of advisory committee members.

An individual may serve on an advisory committee in either of two means. The first is as a member, and the second is as a consultant. A member of an advisory committee will be considered a federal employee if he receives compensation from the government for his service. A consultant who receives compensation, however, may serve either as an employee or as an independent contractor. Independent contractors are not government employees and thus are not subject to the conflict of interest laws.

There is some law to the effect that a committee consisting entirely of consultants who serve under contract is not itself an advisory committee, but the full extent of that exception to FACA is not clear.

The Federal Conflict of Interest Laws

The federal conflict of interest statutes, 18 U.S.C. Sections 202-209, apply to all officers and employees of the United States. Briefly stated, these statutes bar federal employees from representing persons other than the United States in judicial and administrative actions in which the government has an interest. They also prohibit an employee from participating in a decision on behalf of the government in which he has a personal financial interest. Finally, the statutes restrict the activity of employees who have terminated their government service.

Section 202(a) divides employees of the government into two categories, employees and special government employees. A special government employee is an employee "who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days." 18 U.S.C. Section 202(a). The classification of special government employee ("SGE") was created by the enactment of the current conflict of interest statutes in 1962. The intent was to create a status of federal employee to which some, but not all, of the conflict of interest restrictions would apply, the theory being that the full scope of restrictions were unduly burdensome when applied to temporary or intermittent employees.

Section 203(a) prohibits a federal employee from receiving compensation except as provided by law for the proper discharge of his duties "in relation to any proceeding, application, request for a ruling, or other determination, contract, . . . or other particular matter in which the United States is a party or has a direct or substantial interest . . . ." 18 U.S.C. Section 203(a). Violation of Section 203 may result in a fine of not more than $10,000 or imprisonment for not more than two years. Under these same penalties, Section 205 prohibits a federal employee from acting as an agent or attorney in a claim against the United States and from acting as an agent or attorney for any person before a federal agency.

These restrictions apply to a lesser degree to special government employees. An SGE is only prohibited from representing a non-governmental entity in regard to particular matters involving specific parties in which the SGE participated while serving the government. For example, an SGE who participates in the awarding of a federal contract to one competitor over another may not represent the losing contractor in an action against the United States for rescission of the award. However, an SGE who serves the government for more than sixty days out of a year is additionally prohibited from acting as a representative for a non-governmental entity regarding any matter pending before the agency which the SGE serves. Section 205 contains a waiver provision for an SGE who works for an outside organization under a contract with the United States. This provision states, "nothing herein or in Section 203 prevents a special government employee from acting as agent or attorney for another person in the performance of work under a grant by, or in contract with or for the benefit of, the United States provided that the head of the department or agency concerned with the grant or contract shall certify in writing (to be published in the Federal Register) that the national interest so requires." 18 U.S.C. Section 205. This exception permits an SGE to assist a government contractor in the performance of a government contract.

Section 208 prohibits any employee or SGE from participating in any particular matter before the government in which the employee or an organization which he serves has a financial interest. The penalty for a violation of Section 208 is a fine of not more than $10,000 or not more than two years imprisonment. However, the prohibition on participating in a decision in which one has a financial interest will not apply if the employee or SGE fully discloses to the proper government official the nature of his interest and receives "in advance a written determination that this interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee." 18 U.S.C. Section 208(b). The government may also by general rule exempt certain types of financial interest which are remote or inconsequential.

Section 209 prohibits employees from receiving payment for their service as federal employees from any source other than the United States government. The section does not apply to special government employees.

Section 207 contains the conflict of interest restrictions applicable to government employees, including SGEs, who leave government service. These restrictions are threefold. Former government employees are forever prohibited from acting as agent or attorney or otherwise representing any person in regard to any particular matter involving a specific party in which they participated while in government service. Additionally, former government employees are prohibited from personally representing any person before the government in connection with any particular matter involving a specific party which was pending under the employee's official responsibility within the last year of employment for a period of two years. Finally, former employees, including SGEs who serve for more than sixty days of the year, are uniformly prohibited from personally representing any person before their former agency in connection with any particular matter for a period of one year. This ban includes appearances in a rulemaking proceeding. This one year ban does not apply to former employees who work for a state or local government or an accredited degree granting institution of higher education, or a hospital or medical research organization. An agency may also exempt a particular individual from the one year ban if the individual has outstanding qualifications in a technical discipline and the national interest would be served by his appearance.

A determination that someone is a federal employee or special government employee therefore imposes several restrictions upon that person's activities. At a minimum, a special government employee who serves less than sixty days may not represent any person before an agency or against the United States in any matter involving specific parties in which the SGE participated while in government service.[1] In the absence of a specific waiver, the SGE may not participate in any way in any decision concerning a matter in which the SGE or an organization of which he is a part has a financial interest. Upon the conclusion of his government service, the SGE who serves less than sixty days will be forever barred from representing any person in a matter in which the SGE participated on behalf of the government.

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[1] The statute is silent as to whether an SGE's participation in a rulemaking constitutes participation in a particular matter involving specific parties. Sections 203 and 205 clearly subject SGEs to conflict restrictions in fewer instances than is true for regular employees. Employees may not represent outside groups in any particular matter in which the United States is a party or has an interest. The SGE who serves less than sixty days is only prohibited from representing outside groups in relation to particular matters involving specific parties in which the SGE participated substantially as a government employee. Bayless Manning has commented upon the restrictions applicable to SGEs by noting that it is "clear that the statute is concerned with discrete and isolatable transactions between identifiable parties, and is not aimed at excluding the special employee from broad ranges of activities." Manning provides this illustration: "The special employee of the Defense Department who has worked on the establishment of contract procedures is not on that account forbidden to render paid assistance with respect to a particular contract." Manning envisioned other specific cases turning on one's reading of the phrase "particular matter involving a specific party or parties," but believed that the statute was intended to apply to SGEs only in relation to matters involving "immediately identifiable and specific persons." Bayless Manning, Federal Conflict of Interest Law, Harvard Univ. Press, Cambridge, Mass. 1964, p. 70-71.

The designation of employment status is highly significant to advisory committee members. This designation is made initially by the agency which creates the committee and is set forth in the committee's charter. It is significant, for example, that as of June, 1977, all of the experts serving on advisory committees of the Food and Drug Administration are designated as SGEs.[2]

Appointment as an Advisory Committee Member

The Federal Advisory Committee Act (FACA) contemplates that all advisory committee members will be compensated for their service. Section 7(d)(1) of the Act directs the Administrator of General Services "to establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs and consultants of advisory committees . . . ." The Act foresees payment for services as well as the payment of travel and per diem expenses.

This statutory language has recently been challenged by an Interim Rule proposing guidelines for the administration of FACA published by the GSA on April 28, 1983, 48 Fed. Reg. 19324. This rule prohibits agencies from compensating advisory committee members for their services unless the member is appointed to the committee as a consultant. The rule authorizes an agency to appoint a consultant as a member of an advisory committee when FACA's requirement of balanced membership cannot be met through the appointment of noncompensated members. This controversial rule has been rejected by the Office of Management and Budget and referred back to GSA for reconsideration. Thus, it does not remove the need to discuss the effect of a member's receipt of compensation upon his status as an employee.

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[2] Richard A. Merrill, "Problems Involving Federal Conflict of Interest Restrictions on Members of FDA Advisory Committees and Agency Officials," The Center for the Study of Drug Development, Univerity of Rochester Medical Center, (April 1980).

An advisory committee member may be appointed in either an individual or a representative capacity. A member appointed in his individual capacity will be regarded an employee of the government. An individual appointed to a committee in a representative capacity, however, may not in every instance be considered an employee. The guidelines under which these distinctions are made appear in the Federal Personnel Manual, Chapter 725, Appendix C, entitled "Conflicts of Interest Statutes and Their Effects on SGEs (including guidelines for obtaining and utilizing the services of special government employees)".

These guidelines recognize that

> [i]t is necessary occasionally to distinguish between consultants and advisors who are SGEs and persons who are invited to appear at an agency in a representative capacity to speak for firms or an industry or for labor or agriculture or for any other recognizable group of persons, including on occasion, the public at large. p. c-4.

These guidelines further state that

> one who is requested to appear before a government agency to present the views of a non-

> governmental organization or group which he represents, or for which he is in a position to speak, does not act as a servant of the government and is not its officer or employee. He is therefore not subject to the conflict of interest laws . . . . p. c-4.

In addition to drawing the distinction between a member acting in an individual capacity and one acting as a representative, the Federal Personnel Manual lists several principles to which agencies must adhere in determining whether an individual is serving the government in a representative capacity. The first is that "a person who receives pay from the government for his services as an advisor or consultant is its employee and not a representative of an outside group. The government's payment of travel expenses and a per diem allowance, however, does not by itself make the recipient an employee." The phrase "advisor or consultant" as used in the Manual encompasses advisors appointed as individuals and those who are appointed as representatives to a group. See, Federal Personnel Manual, Chapter 735, Appendix C, p. 4-5. This first principle indicates that a member who is compensated for his services (excluding payment for travel and per diem expenses) is a government employee regardless of the fact that he may be appointed to represent the views of a nongovernmental organization. Under this principle, all advisory committee members who accept payment for their services on the committee as envisioned under Section 7(d)(1) of the Federal Advisory Committee Act become employees of the federal government subject to the conflict of interest statutes. This view has been endorsed by the Office of Government Ethics in a memorandum of July 9, 1982, entitled, "Members of Federal Advisory Committees and the Conflict-of-Interest Statutes." The memorandum notes the anomaly of an industry representative qualifying as a federal employee, but concludes that the receipt of compensation is the determining factor of a member's employment status.[3]

The other principles outlined in the Manual for determining whether a person is acting in a representative capacity indicate that (1) a single advisor is usually not a representative whereas a member of a committee may be acting as a representative; (2) an advisor who receives an appointment upon the recommendation of an outside group may be acting as a representative; (3) an advisor authorized to speak for an outside group is usually a representative; and (4) an advisor who is authorized to speak for the United States is an employee of the United States.

Appointment as a Consultant

The Interim Rule currently in effect for administering the

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[3] In comparing the distinctions made in Chapter 725, Appendix C, of the Federal Personnel Manual to the definitional requirements for employee contained in 5 U.S.C. Sec. 2105, which define an employee as one appointed to perform a federal function under federal supervision, the Office of Government Ethics Memorandum states, "[t]o characterize an industry representative or the like as a federal functionary is a contradiction in terms." p. 6. The Memorandum appears to be applying the Manual's distinctions between individual and representative service and is not considering the case of a member who receives compensation. At a later point, the Memorandum reviews the status of members appointed as representatives to the National Professional Standards Review Council and determines that despite appointment as representatives these members are government employees because they receive compensation for their service. The Memorandum states, "[t]he factor of compensation is decisive." p. 12.

Federal Advisory Committee Act directs the heads of agencies to appoint an individual to an advisory committee as a consultant whenever an individual's participation is required and cannot be obtained without compensation. The rule states:

> Unless specifically required by law, agencies shall not compensate advisory committee members for their services on an advisory committee. In the exceptional case when an agency head is unable to meet the need for technical expertise or the requirement for balanced membership solely through the appointment of noncompensated members the agency may contract for the services of a specific consultant who may be appointed as a member of the advisory committee. 41 C.F.R. 101-6.1033(a), 48 Fed. Reg. 19330.

The regulations which preceded this Interim Rule also permitted agencies to appoint consultants as members of advisory committees. See OMB Circular A-63, rev. March 27, 1974.

Consultants may serve the government as either employees (or special government employees) or as independent contractors. The Federal Personnel Manual contains guidelines for determining whether an employee-employer relationship exists between a consultant and the government in Chapter 304, entitled "Experts and Consultants". The Manual states:

> Ordinarily when an agency uses the advisory services of someone of consultant caliber, the agency creates an employee-employer relationship governed by this chapter. Pay for personal service usually indicates an employee-employer relationship, but the relationship also exists when service is unpaid. However, the facts in a situation govern whether the relationship exists . . . . Although not all the conditions usually associated with the relationship are present, an employee-employer relationship subject to this

chapter usually exists when the person:

1) serves under the direction and supervision of a federal employee;
2) works in space and with equipment provided by the government;
3) has access to agency records and files;
4) analyzes for solution specific agency problems and functions and presents recommendations or reports;
5) ordinarily serves on more than one occasion on the same project, and may serve periodically for some time;
6) works on dates or at hours set by or required to be reported to the agency.

These guidelines, although outlining the proper questions to apply in determining whether a consultant is an employee, do not specifically address the role of a consultant appointed to an advisory committee to serve as a representative of the interests of a particular organization or group. The comments of Bayless Manning, an expert on the application of federal conflict of interest law, may be more enlightening:

> The most helpful point for inquiry is the degree of operational control exercised by the party to whom the services are being rendered. The key term is not contractor but independent. If the contract narrowly specifies the work in detail, it looks less like that of an independent contractor. And if the work of the asserted independent contractor is in fact closely supervised by regular government employees, he runs the risk of being considered an employee however his working arrangements may have been drafted. Manning, Federal Conflict of Interest Law, Harvard U. Press, Cambridge, Mass. 1964.

Manning additionally counsels that in applying the criminal sanctions of the conflict of interest statutes it is most useful to ask "whether in the particular situation the person rendering services occupied the kind of inside position that could be taken advantage of in the manner forbidden to an employee" by the conflict of interest laws. Manning, p. 33.

The legal opinions which discuss the distinction between consultants who serve as employees and those who serve as contractors do not involve consultants appointed to advisory committees to represent the views of outside groups. A review of these opinions, however, may clarify the distinction between employee and contractor. An Attorney General opinion concerning the status of an attorney for the receiver of a national bank in 1933 identified this distinction. The attorney general determined that the attorney was a contractor and not an employee of the government and not subject to federal conflict of interest laws upon noting that the attorney was paid out of bank funds, not funds of the United States, did not take an oath of office or receive an appointment, and was free to accept employment concurrent with this service. 37 Op. Atty. Gen. 204 (1933).

More recently, the Comptroller General has stated that the distinction between an employee consultant and a contractor consultant hinges upon the level of federal supervision the consultant receives in the performance of his duties. In 1979, the Comptroller General determined that a consultant who performed services under a contract to the National Center for Productivity and Quality of Working Life may have acted as an employee of the government. This consultant was a retired federal employee who worked within the confines of the National Center, assisting in the wind-up of that agency. The Comptroller General stated, "where services directed at the performance of a federal function are obtained by contract rather than appointment, the question of whether contractor personnel are functioning in an employer-employee relationship with respect to the government is one of supervision." B-193035, April 12, 1979, p. 5. Citing the guidelines of the Federal Personnel Manual for determining the status of consultants, the Comptroller General noted that "supervision by a federal employee . . . is the touchstone of impropriety." p. 9.

The Comptroller General has also distinguished an employee from a contractor consultant engaged by an advisory committee. In 1981 the Comptroller General determined that the International Communications Agency was authorized to pay for the consultant services of a law firm which had been contracted for by United States Advisory Commission on Public Diplomacy. The Comptroller General determined that whether the ICA could pay for the services of the law firm was contingent upon "whether the present contract created a relationship between the Government and the law firm of employer and employee -- in which case it would be prohibited -- or whether the law firm's status is that of an independent contractor -- in which case it would not be prohibited." 61 Comp. Gen. 69 (1981). The opinion explains that this determination is based "primarily on the degree of supervision involved" and concluded that this law firm acted as an independent contractor in providing the Advisory Commission with a "legal review of its authority and a determination of the extent of its independence from ICA." 61 Comp. Gen. 73.

The importance of the level of supervision to a determination of a consultant's status was also noted in Jankovic v. United States 384 F. Supp. 1355 (D.D.C. 1974). Jankovic was a teacher at the Foreign Service Institute who worked as a consultant under contract for ten years prior to receiving a position in the civil service. The District Court held he was a federal employee for the purposes of determining his retirement benefits for the entire period of his service. The court stressed the degree of government supervision of Jankovic's activities as well as the duration of the service and the fact that the service was performed on government property.

The significance of the level of supervision has also been stressed in situations where individuals working for a federal contractor are alleged to be acting as federal employees. In Lodge 1858 AFGE v. Webb, 580 F. 2d 496 (D.C. Cir. 1978), a union sued the National Aeronautics and Space Administration (NASA) alleging that personnel employed by contractors to fulfill contracts made with NASA were in fact federal employees. The court noted that "employees are distinguished from independent contractors most basically by the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed; and the degree of control or supervision is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other federal statutes as well." 580 F. 2d 504-5. The tests for determining whether the level of federal supervision converts a contractor's personnel into federal employees is found in Federal Personnel Manual Letter 300-8. These tests are not unlike the criteria applied to determine the status of advisors and consultants. The questions asked by Federal Personnel Manual Letter 300-8 are:

> Is the contract performed on a federal site?
>
> Are the principal tools and equipment furnished by the government?
>
> Are comparable services performed in the same or similar agencies using agency personnel?
>
> Is the need for this service reasonably expected to last beyond one year?
>
> Does the inherent nature of the service require directly or indirectly government direction or supervision, to protect the government's interest, or to retain control or responsibility of the function involved?

The cases discussed thus far stress that the degree of federal supervision is the fundamental determinant of a consultant's employment status in the government. Other cases involving work performed under contract to the government have held that an individual who seeks benefits as a federal employee must meet each of the three statutory requirements for the definition of federal employee found in 5 U.S.C. Sec. 2105. This definition specifies that a federal employee is an individual who is appointed by a federal officer or employee to perform a federal function under the supervision of a federal officer or employee. In Costner v. United States, 665 F. 2d 1016 (Ct. Cl. 1981), an individual who was hired by an independent contractor to work in federal facilities was denied status as a federal employee. The court stated, "it is obvious from the statutory language that there are three elements to the definition [of Federal employee] -- appointment by a federal employee or officer; performance of a federal function; and supervision by a federal employee or officer. A person must satisfy each requirement." 665 F. 2d 1020. The court further noted, "the common law does not govern federal relationships, especially where as here, the federal statute expressly goes beyond the common law and requires more than just the supervisory relationship. 665 F. 2d 1021. The importance of the statutory definition is also stressed in Curran v. Office of Personnel Management, 566 F. Supp. 511 (D.D.C. 1983), where employees of an independent contractor were denied benefits as federal employees due to the absence of a federal appointment. See also, Baker v. United States, 614 F. 2d 263 (Ct. Cl., 1980) (Individual who worked in a Department of Labor sponsored program is not a federal employee for purposes of claiming retirement benefits, due to the absence of an appointment.)

One case to directly address the applicability of the definition of employee found in 5 U.S.C. Sec. 2105 is Spirides v. Reinhardt, 613 F. 2d 826 (D. C. Cir. 1979). In this case, a woman working under a contract as a broadcaster for the Voice of America sued the VOA alleging sex discrimination when her contract was not renewed. The court found the definition of employee in 5 U.S.C. Sec. 2105 inapplicable to this case. The court stated, "the issue to be decided is not whether Spirides is an employee under the civil service laws, but whether she may in any respect be deemed an employee under Title VII [of the Civil Rights Act of 1964] . . . . Therefore resort to the civil service definition is unwarranted, and whether or not Spirides may be deemed an employee cannot be determined merely by noting the absence of appointment." 613 F. 2d 831. The court held Spirides might qualify as a federal employee under the proper analysis of the "economic realities of the work relationship." Id.

Application of Different Definitions

The applicability of the conflict of interest statutes to advisory committee members, whether they serve as members directly or by appointment under a consultant contract, is difficult to assess due to the language of the conflict of interest statutes themselves. The statutes apply to officers and employees of the United States but these terms are not defined. A definition of both officer and employee appears in Title V of the U.S. Code (5 U.S.C. Secs. 2104 and 2105); these definitions are not specifically addressed to the conflict of interest statutes, however.

The definition of employee as applied to advisory committee members most frequently turns on whether the member acts in an individual or representative capacity. But, any member who receives compensation from the government is considered an employee whether or not they are nominally participating as a representative of a broader constituency.

On the other hand, the employment status of a consultant working under a government contract usually turns upon the degree of federal supervision given to the consultant's performance of his duties. Courts have strictly applied the definition of employee contained in 5 U.S.C. Sec. 2105 when a contractor-consultant seeks designation as a federal employee for the purpose of qualifying for federal employee benefits. C.f. Costner v. United States, 665 F. 2d 1016 (Ct. Cl. 1981); Curran v. Office of Personnel Management, 566 F. Supp. 511 (D. D. C. 1983). In contrast, for other purposes, courts, the Attorney General, and the Comptroller General have concentrated upon the level of federal supervision of a consultant's performance in determining employment status. C.f. 37 Op. Atty. Gen. 204 (1933) (Attorney for receiver of national bank not an employee for purposes of conflict of interest.); 61 Comp. Gen. 69 (1981) (law firm serving as a consultant to advisory committee not an employee for purpose of evaluating the legitimacy of a contract); Lodge 1858 AFGE v. Webb, 580 F. 2d 496 (D.C. Cir. 1197) (contractor employees not federal employees for purposes of determining total federal workforce at a site); Spirides v. Reinhardt, 613 F. 2d 826 (D.C. Cir. 1979) (contractor consultant may be an employee for purposes of challenging alleged sex discrimination in employment). Thus, the level of supervision appears of central importance to a determination of an advisory committee consultant's employment status for purposes of the conflict of interest statutes. A consultant appointed to an advisory committee and compensated for this service resembles a federal employee in that the consultant's ongoing participation on the committee is supervised to some degree by the agency which the committee serves. The consultant resembles an independent contractor in that he provides the agency with information obtained and developed outside the agency -- and submitted to the agency in a final form.

The employment status of a consultant appointed to an advisory committee is difficult to determine for it is not clear whether the person remains a consultant, subject to the tests applicable for determining the employment status of consultants, or whether the person hired as a consultant but appointed to an advisory committee becomes subject to the tests applicable for determining the employment status of members. If the consultant is subject to the test as a member, the receipt of compensation appears to create employee status. However, if the consultant appointed to an advisory committee remains subject to the tests for employment status applicable to consultants, the consultant may be compensated as an independent contractor without becoming a government employee and hence would not be subject to the conflict of interest restrictions discussed above. The issue is particularly complex because it would appear that under traditional analysis a member of an advisory committee should virtually always be regarded as an independent contractor and hence not a special government employee. That is because the Act itself requires the agency to build in safeguards to ensure that the agency does not inappropriately sway the views of the committee so that it will render its "independent judgment." Secs. 5(b)(3), 5(c). Thus, the very existence of an advisory committee seems inconsistent with the supervision that is necessary to make someone an employee and contemplates instead the very independent expertise that makes someone a contractor and not an employee. The question of whether or not someone is paid for their service is typically irrelevant to that determination. But, payment has historically been elevated to special status with respect to advissory committees. This anomoly could therefore mean that the restrictive test would apply regardless of the nature of the person's service on an advisory committee, as opposed to whether the person is a consultant to the committee as in the case of the lawyers discussed above.

An Agency's Contracting for the Services of an Entire Committee

An agency could contract with an outside organization to assemble a committee of consultants representing the views of non-governmental organizations to develop a final paper or recommendation to be submitted to the agency. In short, courts have not resolved the issue of whether such a group constitutes an advisory committee subject to the Federal Advisory Committee Act. If such a committee is not subject to FACA, then its members serve as consultants employed either as independent contractors or as employees of the contracting organization and are not federal employees and thus not subject to the federal conflict of interest laws.

The Federal Advisory Committee Act broadly defines the term advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is . . . established or utilized by one or more agencies in the interest of obtaining advice or recommendations . . . ." FACA Sec. 3(2). The broad sweep of this definition would certainly appear to include a group assembled under a contract with a consultant or other organization. The Conference Report of the law seems to exempt a committee serving an agency under such a contract however: "The Act does not apply to persons or organizations which have contractual relations with Federal agencies nor to advisory committees not directly established by or for such agencies." Conf. Rept. No. 92-1403, 92 Cong., 2d Sess., as reprinted in 1972 U.S. Code Cong. and Admin. News at 3509.

The United States District Court for the District of Columbia reviewed this section of FACA in Lombardo v. Handler, 397 F. Supp. 792 (D. D. C.), aff'd without opinion 546 F. 2d 1043 (D. C. Cir. 1975) In this case an association interested in the subject of air pollution sought to have the Committee on Motor Vehicle Emissions of the National Academy of Sciences declared an advisory committee of the Environmental Protection Agency. The EPA had entered into a contract with the Academy under which the Academy's Committee on Motor Vehicle Emissions conducted several studies regarding the feasibility of meeting certain emission standards. After reviewing the legislative history of the FACA the court concluded, "the legislative history of the F.A.C.A. evidences an apparent intention on the part of Congress to exclude from the coverage of the Act generally groups providing advice to federal agencies pursuant to a contractual relationship . . . ." 397 F. Supp. 800. The exemption from FACA afforded to committees of the National Academy of Sciences has support in the legislative history of the Act. The Academy also exercises a review process over the reports of its committees which lends support to the contractual nature of the relationship between the Academy and federal agencies. For these reasons, the holding of Lombardo concerning a committee of National Academy of Sciences may not be broadly applicable to other consultant-agency contractual arrangements.

The applicability of the FACA to an agency's contract for consulting services arose in another case involving the Environmental Protection Agency, American Petroleum Institute v. Costle, 653 F. 2d 1176 (D. C. Cir., 1981). The case concerns a variety of organizations' challenges to the national ambient air quality standards for ozone issues by the EPA. One of the challenges concerned the EPA's use of a panel of consultants. In the course of developing its standards, EPA hired a panel of environmental experts as consultants to prepare a detailed report on the translation of health data into an ambient air quality standard for photo chemical oxidants. The chairman of this panel prepared the final report. API contended that this panel constituted an advisory committee. EPA defended its use of this panel arguing it "is not subject to FACA because the group consisted of paid consultants and the legislative history of FACA indicates that the Act was not intended to apply to persons having contractual relationships with the government." 665 F. 2d 1189. The circuit court chose not to resolve this dispute on the grounds that any finding of a violation of FACA would not invalidate the standard issued by the EPA.

The exclusion from FACA's coverage of persons and groups having a contractual relationship with any agency is a potentially sweeping exception to the FACA. This interpretation is in stark contrast to the broadly inclusive definition of advisory committee contained in the statute. The Department of Justice has challenged the view that the legislative history of FACA excludes all agency contractual relationships. The Department has argued that "if the mere existence of a contract were decisive, avoidance of the Act in situations involving 'utilized' advisory committees could easily be accomplished."[4] This question has yet to be resolved, however.

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[4] Letter from Robert G. Dixon, Jr., Ass't Attorney General, Office of Legal Counsel, Department of Justice to Peter Barton Hutt, Ass't General Counsel, Food and Drug Administration, HEW, Nov. 23, 1973, quoted in Kit Gage and Samuel S. Epstein, "The Federal Advisory Committee System: An Assessment," 7 ELR 50001 (1977).